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No.

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1996

SCIOTO COUNTY REGIONAL WATER DISTRICT NO. 1,
AUTHORITY,
*Petitioner,*
v.
SCIOTO WATER, INC., AND DANIEL R. GLICKMAN,
SECRETARY,
UNITED STATES DEPARTMENT OF AGRICULTURE
*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals For The Sixth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Section 1001 of the Omnibus Budget Reconciliation Act of 1986 ("OBRA") mandated that the Secretary of Agriculture (the "Secretary"), in fiscal years 1987-89, sell certain amounts of rural development loans evidenced by notes and other obligations held by the Farmers Home Administration ("FmHA") pursuant to the Consolidated Farm and Rural Development Act of 1961 (the "Rural Development Act") to assist the government in meeting the Gramm-Rudman-Hollings Act budget requirements. Section 803 of the Agricultural Credit Act of 1987 ("ACA") added subsections (f) and (g) to Section 1001 of OBRA. Subsection (f) requires that borrowers whose bonds the Secretary selects for sale be given a right of first refusal to buy them. Subsection (g) specifies that the curtailment and limitation of service prohibitions of § 306(b) of the Rural Development Act, 7 U.S.C. § 1926(b), protecting the service area of the borrower, shall be applicable to "all notes or other obligations sold or intended to be sold under this section". The question presented is:

Whether under Section 1001(g) of OBRA the curtailment and limitation of service prohibitions of 7 U.S.C. § 1926(b) continue to apply to protect Petitioner's service area after Petitioner purchased its own bonds from the Secretary by exercising the right of first refusal accorded it pursuant to Section 1001(f) of OBRA.

## LIST OF PARTIES

SCIOTO COUNTY REGIONAL WATER DISTRICT NO. 1, AUTHORITY (Petitioner), a regional water district created in 1966 as a political subdivision of the State of Ohio pursuant to Ohio Rev. Code Ann. § 6119, was the Plaintiff in the United States District Court for the Southern District of Ohio, Western Division, and Appellant before the United States Circuit Court of Appeals for the Sixth Circuit. There are no parent companies or non-wholly owned subsidiaries of Petitioner.

The following were Defendants in the United States District Court for the Southern District of Ohio, Western Division, and Appellees before the United States Circuit Court of Appeals for the Sixth Circuit: SCIOTO WATER, INC., a private, non-profit water supply corporation; and DANIEL R. GLICKMAN, Secretary of the United States Department of Agriculture, who has control of, and responsibility for, the Rural Economic and Community Development Service ("RECD") (formerly the Farmers Home Administration ("FmHA"), now known as Rural Development).

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SCIOTO WATER, INC., AND DANIEL R. GLICKMAN, SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Scioto County Regional Water District respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

## OPINIONS BELOW

Review is sought of the Judgment of the United States Court of Appeals for the Sixth Circuit, dated December 18, 1996, reported as *Scioto County Regional Water District No. 1, Authority v. Scioto Water, Inc., et al.*, 103 F.3d 38 (6th Cir. 1996). The opinion of the Sixth Circuit Court of Appeals appears at pages 2a through 10a of the Appendix. The opinion of the United States District Court for the

Southern District of Ohio, Western Division, dated August 2, 1995, *Scioto County Regional Water District No. 1, Authority v. Scioto Water, Inc., et al.*, No. 6-1-95-204, is unreported, and appears at pages 11a through 26a of the Appendix.

## JURISDICTION

The Sixth Circuit Court of Appeals entered its judgment on December 18, 1996. A copy of the judgment appears at page 1a of the Appendix. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## STATUTORY PROVISIONS INVOLVED

The principal statute involved is Section 1001 of the Omnibus Budget Reconciliation Act of 1986 ("OBRA"), Pub. L. No. 99-509, 7 U.S.C. § 1929a, note. Section 803 of the Agricultural Credit Act of 1987 ("ACA"), Pub. L. No. 100-233, Title VIII, § 803, 101 Stat. 1714 (1988), amended Section 1001 of OBRA to add subsections (f) and (g):

"SEC. 803. SALE OF RURAL DEVELOPMENT NOTES.

> Section 1001 of the Omnibus Budget Reconciliation Act of 1986 (7 U.S.C. 1929a note) is amended by adding at the end thereof the following new subsections:
>
> *(f) Right of First Refusal. —*
>
> (1) In General. — Before conducting a sale of a portfolio of notes or other obligations under this section, the Secretary of Agriculture shall —

(A) determine whether the issuer of any unsold note or other obligation desires to purchase the note or other obligation; and

(B) if so, hold open for 30 days, an offer to sell the note or other obligation to the issuer at a price to be determined under paragraph (2).

*(2) Determination of Offering Price. —*

(A) Authority. — The Secretary of Agriculture shall determine, in accordance with subparagraph (B), the price at which a note or other obligation shall be offered for sale under this subsection.

(B) Price. — Such price shall be determined by discounting the payment stream of such note or other obligation at the yield on the then most recent sale of the portfolio, adjusted for changes in market interest rates, servicing and sales expenses, and the maturity and interest rate of such note.

*(3) Prohibitions.—*

(A) Purchase of the Obligation Not Tied to Purchase of Other Obligations. — The Secretary of Agriculture shall not require the issuer of any unsold note or other obligation to be offered for sale under this subsection to purchase any other such note or other obligation as a condition of the sale of any such note or other obligation to the issuer.

(B) Offer to be Made Without Regard to Financing. — The Secretary shall offer notes or other obligations for sale to the issuers thereof under this subsection without regard to the manner in which such issuers intend to finance the

purchase of such notes or other obligations. However, the price of sale to any issuer using tax exempt financing shall be determined using a yield reflective of the Schedule of Certified Interest Rates as published monthly by the Secretary of the Treasury.

(g) Applicability of Prohibition on Curtailment or Limitation of Service. — Section 306(b) of the Consolidated Farm and Rural Development Act (7 U.S.C. 1926(b)) shall be applicable to all notes or other obligations sold or intended to be sold under this section."

Section 1001 of OBRA, as amended, appears in the Appendix at pages 90a through 93a.

The provision referenced in § 1001, subsection (g) of OBRA, Section 306(b) of the Consolidated Farm and Rural Development Act of 1961 (the "Rural Development Act"), 7 U.S.C. § 1926(b) provides:

"(b) Curtailment or limitation of service prohibited

The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of the loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of occurrence of such event."

## STATEMENT OF THE CASE

### I. Statement of Facts.

In Section 306 of the Consolidated Farm and Rural Development Act of 1961, 7 U.S.C. § 1926, Congress established a community development loan program administered by the FmHA authorizing loans to associations providing water service to farmers, ranchers, farm tenants, and other rural residents. S. Rep. No. 566, 87th Cong., 1st Sess., reprinted in 1961 U.S.C.C.A. 2243, 2309.

Petitioner Scioto County Regional Water District No. 1, Authority ("Water 1") was organized as a public district at the request of five townships in Scioto County, Ohio, to be a wholesale and retail water purveyor, and became effective upon order of the Court of Common Pleas of Scioto County, Ohio on or about November 28, 1966. (¶V.1.)[1] Subsequently, over the next two to three years, three additional townships were added to Water 1's service area. Since that time, Water 1 has continuously provided water service to these eight townships of rural northeastern Scioto County. (*Id.*)

From May 17, 1967 through November 29, 1973, Water 1 issued, pursuant to appropriate authorizing ordinances, and sold three series of revenue bonds in the total amount of $2,996,000 to the FmHA under the Rural Development

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[1] As this matter comes before this Court from the District Court's granting of a motion to dismiss pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6), the specific facts set forth in this and other paragraphs of the text in this section of the Petition concerning Water 1 are taken from Water 1's First Amended Complaint (Verified) for Temporary Restraining Order; Alternatively, Preliminary Injunction, Permanent Injunction, and Mandamus Order ("First Amended Complaint"). References in the text are to the paragraphs of the First Amended Complaint. The First Amended Complaint appears at pages 94a through 115a of the Appendix.

Act. (¶V.2.) The funds developed from the sale of these bonds were utilized to construct and operate an affordable cost water utility to serve the eight rural townships, and the bonds were secured by all system revenues derived from Water 1's operations in those eight townships. (*Id.*) On May 1, 1975, Water 1 issued water revenue refunding bonds in the amount of $2,473,000 to the FmHA, having redeemed, by consent of the FmHA, the initial and outstanding resource revenue bonds. (¶V.4.) Throughout this period, the curtailment prohibitions of 7 U.S.C. § 1926(b) protected the service area, revenues, and rate payers (present and future) from any act of impairment. ((¶¶V.2, 4.) In addition, pursuant to the Rural Development Act and regulations promulgated by the Secretary of Agriculture pursuant thereto, Water 1 was obligated to make service available throughout the service area. (¶V.3.) 7 C.F.R. §§ 1942.17(e)(1), (n)(2)(vii).

In 1972, Respondent Scioto Water, Inc. ("SWI") sought permission to become Water 1's permittee to extend Water 1's transmission lines to areas in which Water 1 was obligated to provide service or make service available. (¶V.3.) Water 1 and SWI therefore entered into an agreement by which Water 1 provided water to SWI on a wholesale basis and SWI provided water on a retail basis to a portion of Water 1's service area. (¶V.5.) Various contracts were entered into over the years by the two entities under which Water 1 was a water producer, wholesale supplier and retailer, and SWI was a bulk water purchaser and retailer. (¶¶V.5,6,7.) Water 1 incurred additional debt in order to finance expansion and improvements of its well field and treatment facility in reliance upon the revenue stream expected over the 60-year term of the water purchase agreement with SWI. (¶V.8.)

In 1986 Congress passed OBRA, which in Section 1001 ordered the Secretary to sell FmHA notes and bonds in its

Rural Development Insurance Fund in order to lower the federal deficit on a schedule mandated by the Gramm-Rudman-Hollings Act.[2] Section 1001(a) required the Secretary to sell a sufficient quantity of such notes and bonds during fiscal years 1987-89 to achieve prescribed minimum net proceeds to the government for each fiscal year.

In 1987, Congress passed ACA, "the most comprehensive and far-reaching legislation addressing the delivery of agricultural credit in many years," H.R. Res. No. 100-295(I), 100th Cong., 1st Sess. 53, reprinted in 1987 U.S.C.C.A.N. 2723, 2725. "One of the primary purposes of enacting this comprehensive legislation was to create an improved secondary market for FmHA loans. See id. at 54, reprinted in 1987 U.S.C.C.A.N. at 2725.26." *City of Grand Junction v. Ute Water Conservancy District*, 900 P.2d 81, 92 (Colo. 1995) (App., *infra*, 27a-66a).[3] ACA Section 803, added to Section 1001 of OBRA subsections (f), according a right of first refusal to borrower water districts, and (g), extending the service area protections to "all notes or other obligations sold or intended to be sold under this section."

The Secretary of Agriculture has never issued regulations respecting the implementation of OBRA.

In 1989, Water 1's bonds were selected by the Secretary of Agriculture for sale pursuant to Section 1001 of OBRA, and the Secretary accorded Water 1 a right of first refusal pursuant to Section 1001(f) of OBRA to purchase its own bonds. (¶V9.) Water 1 exercised that right of first refusal and purchased its own bonds. (*Id.*) Water 1 effected the purchase of its bonds through private financing and remains indebted on that financing.

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[2]The Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. 99-177, 99 Stat. 1038 (1985).

[3]"App., *infra*, 27a-66a" refers to pages 27a-66a of the attached Appendix.

Commencing in 1990-91, SWI sought and subsequently obtained approval of a loan and grant from the FmHA, the initial disbursement of which was received by SWI in 1994, for development of a new well field two miles upstream from Water 1's well field and a supporting water treatment plant to provide a water source independent of Water 1. (¶V.10.)

## II. Proceedings Below.

### A. U.S. District Court for the Southern District Court of Ohio, Western Division.

On March 17, 1995, Water 1 filed a complaint in the U. S. District Court for the Southern District of Ohio, Western Division, against SWI and the Secretary of Agriculture alleging SWI's encroachment upon Water 1's service area in violation of the curtailment and limitation of service prohibitions of 7 U.S.C. § 1926(b), as applied by Section 1001 of OBRA and Section 803 of ACA, and the Secretary of Agriculture's failure to enforce those provisions. On March 24, 1995, Water 1 filed its First Amended Complaint (Verified) for Temporary Restraining Order; Alternatively Preliminary Injunction, Permanent Injunction, and Mandamus Order ("First Amended Complaint"). Water 1's First Amended Complaint appears at pages 94a through 115a of the Appendix. Subsequently, the District Court granted Water 1 leave to amend to add an additional basis for jurisdiction, and additional claims. Water 1's Motion for Leave to Supplement Amended Complaint appears at pages 116a through 126a of the Appendix.

Water 1 invoked the jurisdiction of the District Court under 28 U.S.C. § 1331 (federal question jurisdiction); the Intergovernmental Cooperation Act, 31 U.S.C. § 6501 *et seq.*; the Administrative Procedure Act, 5 U.S.C. §§ 551, 701 *et seq.*; the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201-02; the Mandamus and Venue Act, 28 U.S.C. § 1361; the All Writs Act, 28 U.S.C. § 1651, *et seq.*;

and, over certain Ohio state law claims, 28 U.S.C. § 1367 (supplemental jurisdiction).

Water 1 alleged in its First Amended Complaint that SWI's well field and surface water treatment plant, and the Secretary of Agriculture's approval of that project, would impair Water 1's system and result in lost revenues based on: (a) loss of bulk water sales; (b) loss of underground aquifer water flows; (c) loss of volume of water due to well field proximity; (d) required redesign and reconstruction of Water 1's water treatment plant; (e) and loss of retail customers to SWI. Water 1 further alleged that this development would transform SWI into a water producer and eliminate the bulk water sales upon which Water 1's financing was predicated in part, thereby impairing its ability to repay its indebtedness. (¶¶V.8,12;¶VI.3.)

Therefore, Water 1 sought a permanent injunction against SWI and the Secretary of Agriculture from violating the curtailment and limitation of service prohibitions of 7 U.S.C. § 1926(b); injunctive relief against SWI and the Secretary of Agriculture to comply with the Intergovernmental Cooperation Act, 31 U.S.C. § 6501 *et seq.*; injunctive relief under the Administrative Procedure Act, 5 U.S.C. § 706; a writ of mandamus directed to the RECDS; declaratory relief; attorney's fees; and monetary relief under certain Ohio state claims.

In response, SWI filed a motion to dismiss Water 1's First Amended Complaint under Federal Rules of Civil Procedure, Rule 12(b)(6), and a Cross-Complaint. Water 1 then filed a motion for partial summary judgment on its claim under the curtailment and limitation of services prohibitions of 7 U.S.C. § 1926(b). The Secretary of Agriculture filed a counter-motion for summary judgment.

The District Court, the Honorable Sandra S. Beckwith presiding, in an unpublished opinion, granted SWI's motion

to dismiss Water 1's federal claims; then declined to exercise supplemental jurisdiction over Water 1's Ohio state claims; and denied Water 1's application for injunctive relief, application for temporary restraining order, and motion for partial summary judgment as moot. D.C.Op. at p. 18 (App., *infra*, 26a).[4] The District Court's ruling was based on its conclusion that Water 1 had failed to state a claim under 7 U.S.C. § 1926(b). *Id.*

The District Court found the language of Section 1001(g) of OBRA, applying the provisions of 7 U.S.C. § 1926(b) to "all notes and bonds sold or intended to be sold", ambiguous, and therefore looked beyond the language of subsection (g) in order to determine the meaning of that language. D.C.Op. at p. 14 (App., *infra*, 22a). The Court was not persuaded that there was any administrative interpretation of the agency that deserved deference (D.C.Op. at p. 14, n. 8 (App., *infra*, 22a-23a)), and found the legislative history did not provide any insight with regard to the specific issue before it. D.C.Op. at p. 12, n. 6 (App., *infra*, 21a). Instead, the District Court interpreted Section 1001(g) of OBRA to recognize two types of obligations, those sold to third parties and those purchased by the issuer, based upon its construction of the phrase "under this section". D.C.Op. at pp. 14-15 (App., *infra*, 23a). The Court concluded that "all notes sold or intended to be sold under this section" applies only to notes sold to third parties, and that a purchase by the issuer was not a sale "under this section". D.C.Op. at p. 15 (App., *infra*, 23a). Therefore, in the conclusion of the District Court, the curtailment and limitation of service prohibitions of 7 U.S.C. § 1926(b) are not extended by Section 1001(g) of OBRA to purchases by the

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[4]References to the unpublished opinion of the District Court, *Scioto County Regional Water District No. 1, Authority v. Scioto Water, et al.*, No. C-1-95-204 (S.D.W.D. Ohio Aug. 2, 1995), are to "D.C.Op.".

issuer of its own notes or other obligations. D.C.Op. at pp. 15, 16 (App., *infra*, 23a-24a).

The District Court reasoned that its interpretation of OBRA was consistent with the statutory scheme, because continued service area protection would provide an inducement to third party purchasers that would further the purpose of OBRA to generate specified net proceeds by selling notes and other obligations held by it. D.C.Op. at pp. 15 (App., *infra*, 23a-24a). On the other hand, the court continued, offering the same incentive to debtors who might wish to repurchase their obligations would not necessarily further assist the Secretary in fulfilling the statutory mandates, because the statute offered a different incentive to debtors: purchasing at a discount. D.C.Op. at pp. 15-16 (App., *infra*, 23a-24a). Therefore in the view of the District Court, there is a rational basis for extending the service area protection to third party purchases, but not to issuer purchases. D.C.Op. at pp. 15-16 (App., *infra*, 24a). As an additional rational basis for this distinction, the District Court found it reasonable that Congress extended to third parties the continued service area protection because such third-party purchasers have no control over the transaction and could not be said to have voluntarily relinquished the benefits conferred by 7 U.S.C. § 1926(b). D.C.Op. at p. 16 (App., *infra*, 24a). The issuer purchaser, however, in the view of the District Court, could be said to have voluntarily relinquished any rights bestowed by that section. D.C.Op. at p. 16 (App., *infra*, 24a).

Although the District Court dismissed the entirety of Water 1's claims, the decision of the District Court is interlocutory because the Counter-Claim of SWI remains to be adjudicated.

**B. The Sixth Circuit Court of Appeals.**

The Sixth Circuit articulated the issue before it as follows: "whether subsection (g)'s provision that § 1926(b) applies to 'all' obligations 'sold or intended to be sold' means that § 1926(b)'s protection extends to a bond issuer, such as Water 1, that buys back its own bonds from the Farmers Home Administration, effectively extinguishing them." 103 F.3d. at p. 40 (App., *infra*, 7a). Recognizing that the issue before it was one of first impression in the federal courts (103 F.3d at pp. 40-41 (App., *infra*, 7a)), the Sixth Circuit Court of Appeals affirmed. It described the District Court opinion as well-reasoned and endorsed the District Court's conclusion that Section 1001(g) of OBRA applies only to obligations sold by the FmHA to third parties and not to Water 1's repurchase of its own bonds. 103 F.3d at p. 42 (App., *infra*, 10a).

The Sixth Circuit accepted SWI's argument that Water 1's bonds were marked "paid in full" by the Department of Agriculture when Water 1 paid for them, and therefore, the debt was discharged in the transaction, not sold. 103 F.3d at p.42 (App., *infra*, 10a). The Court suggested that the intent of the parties in this transaction was to discharge the bonds rather than preserve the obligation. Accordingly, in the Circuit Court's view, Water 1 is not eligible for protection of its service area because 7 U.S.C. § 1926(b) requires that Water 1 be indebted to the FmHA. *Id.* The Circuit Court found this interpretation faithful to the main legislative purposes in enacting 7 U.S.C. § 1926(b) — safeguarding FmHA loans: "Although the government maintains an interest in providing affordable rural water service, its interest in protecting against competition diminishes as its loans are repaid." *Id.* The Court further agreed with SWI's argument that the language of Section 1001(g) did not alter the requirement that Water 1 be indebted to the FmHA.

## REASONS FOR GRANTING THE PETITION

### I. The Decision of the Sixth Circuit Court of Appeals Creates a True, Direct and Irreconcilable Conflict with the Decision of the Colorado Supreme Court in *City of Grand Junction v. Ute Water Conservancy District*, 900 P.2d 81 (Colo. 1995) Regarding an Important Question of Federal Law, the Application of Section 1001(g) of OBRA.

As articulated by both the District Court and the Court of Appeals below, the Colorado Supreme Court in *Ute Water Conservancy District v. City of Grand Junction*, 900 P.2d 81 (Colo. 1995) (*"Ute"*)[5] considered the question presented in this Petition and concluded that Section 1001(g) of OBRA extends the curtailment and limitation of service prohibitions of 7 U.S.C. § 1926(b) to a debtor who purchases its own notes at a discount under the right of first refusal provisions of Section 1001(f) of OBRA: OBRA Section 1001 "directs the FmHA to sell notes and bonds in its possession in order to lower the Federal deficit without removing the protection provided for rural districts and their lenders under § 1926(b)." 900 P.2d at 85, n. 5 (App., *infra,* 37a). The Colorado Supreme Court looked at the plain language of the statute and found the use of the word "all" in the phrase "all notes and other obligations sold or intended to be sold under this section" in Section 1001(g) of OBRA unambiguously included all notes sold under the asset sale program, whether to third parties or to the issuer. *Ute*, 900 P.2d at pp. 90-91 (App., *infra,* 52a-53a).

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[5] A copy of the opinion appears at pages 27a through 66a of the Appendix. The Appendix also contains, at pages 67a through 78a, a copy of the Colorado Court of Appeals decision the Colorado Supreme Court affirmed.

Furthermore, the Colorado Court found that the fact "Congress provided for a comprehensive scheme for selling bonds held by the FmHA back to the issuers also supports our conclusion that Congress intended to allow an issuer to reacquire its bond or note without losing protection under Section 1926(b). See ACA, § 803(f) and (g), of Stat. 1714 (codified at U.S.C. § 1929(a) note (1994))." *Id.* at p. 91 (App., *infra,* 54a).

The District Court specifically disagreed with this conclusion[6] and proceeded to read the statute to reach the opposite conclusion, that the term "notes and bonds sold or intended to be sold" referred to only those sold to third parties. D.C.Op. at p. 15 (App., *infra* 22a-23a). The District Court, therefore, concluded that Section 1001(g) of OBRA applies the service area protection provisions only to all notes sold to third parties.[7] *Id.* The Sixth Circuit in the conclusion of its opinion describes the District Court's opinion as "well-reasoned", articulates the conclusion of the District Court that Section 1001(g) of OBRA applies only to FmHA obligations sold to third parties and not to issuers who purchase their own obligations, and affirms the District Court's judgment. 103 F.3d at p. 42 (App., *infra,* 10a).

At an earlier point in its opinion, the Sixth Circuit sought to distinguish the decision of the Colorado Supreme Court in *Ute* with regard to the question presented in this Petition on the basis that the Court in *Ute* articulated that the protections of 7 U.S.C. § 1926(b), as extended by Sec-

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[6]The District Court stated, "This Court disagrees with the conclusion that the language of § 1929a note, subsection (g) clearly encompasses those obligations which a debtor has purchased from the FmHA." D.C.Op. at 14-15.

[7]Of course, this reading renders the phrase, "intended to be sold", in Section 1001(g) meaningless, mere surplusage. This problem with the District Court Opinion is discussed in a subsequent portion of this section.

tion 1001(g) of OBRA, apply to bonds the issuer has repurchased with the intent not to discharge the obligation.[8]103 F.3d 42 (App., *infra*, 9a-10a). Furthermore, the

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[8]In *Ute*, the district issued bonds in 1981. In 1983, it engaged in a transaction known as an advance refunding in which it issued new bonds and deposited the proceeds in an escrow account from which payment of the installments of principal and interest on the 1981 bonds were made as they came due. The escrow account replaced the district's revenues as security for the 1981 bonds and the revenues became security for the new bonds. In 1998, when Ute Water Conservancy District purchased its 1981 bonds under Section 1001 of OBRA, the Department of Agriculture endorsed them over to the District and directed the escrow agent to make payments under the bonds to the District. *Ute* at p. 93 (App., *infra*, 58a). The trial court found, based primarily on these facts, that the Secretary of Agriculture and the water district evidenced an intent to preserve the obligation in the transaction. The Colorado Supreme Court concluded that the federal statutes govern whether the purchase by an issuer water district of its own bonds under OBRA serves to extinguish the obligation. The *Ute* court further concluded that Section 1001(g) expresses the specific intent of Congress to preserve such obligations for the purpose of preserving the protections of 7 U.S.C. § 1926(b). Given the trial court's determination that in the case before it the parties had specifically structured the transaction so as to preserve the obligation, the Colorado Supreme Court understandably included that fact when it stated its holding:

> "Therefore, we hold that section 1926(b) applies to all notes and bonds sold by the FmHA — including those reacquired by the issuer with the intent not to discharge the instrument, as in the present case — and that the District did not discharge the 1981 revenue bond when it reacquired the instrument from the FmHA in 1988."

*Ute* at p. 92 (App., *infra*, 55a). The facts of this case present a different issue, due to the actions of the Secretary of Agriculture in marking the bonds "paid in full". Water 1's position on this Petition is that the result should be the same, because the key issue is the intent of Congress as expressed in the plain meaning of the statute and does not depend upon the intent of the parties, and certainly not the intent of the Department of Agriculture. The District Court seemed to understand this point, as its opinion is based upon its erroneous reading of OBRA, rather than upon any consideration of the specific intent of the parties. Furthermore, Petitioner finds no indication in section 1001(g) that Congress required

Sixth Circuit erroneously stated that the Colorado Supreme Court relied on state law for the proposition that repurchase of a bond does not necessarily extinguish it. 103 F.3d at p. 42 (App., *infra,* 10a). In fact, the Colorado court concluded that federal law was determinative, *Ute* at pp. 87-89 (App., *infra,* 42a-50a), and merely stated that Colorado law supported its conclusion, *Ute* at p. 92 (App., *infra,* 55a). The Sixth Circuit proceeded to distinguish the facts of this case by stating that the bonds had been marked as "paid in full" by the Department of Agriculture and returned to Water 1. 10 F.3d 42 (App., *infra,* 10a). Irrespective of the propriety of the Sixth Circuit's consideration of facts not before it on a motion to dismiss,[9] the Court of Appeals simply stated as a fact that a purchase by an FmHA debtor of its own obligations serves to extinguish them and therefore eliminates the debt required for application of 7 U.S.C. § 1926(b).[10] Therefore, the Sixth Circuit's view is, in essence, that as a matter of law a debtor who purchases its own FmHA obligations is not benefitted by Section 1001(g) of OBRA, a position consistent with the last paragraph of its

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a debtor water district to engage in a fiction like that created by the water district and the Secretary of Agriculture in the *Ute* case in order to continue receiving the service area protection for the length of the term of its bonds purchased under OBRA.

[9]This case involves the District Court's granting of a motion to dismiss under the Federal Rules of Civil Procedure, Rule 12(b)(6). The complaint does not include this allegation and it is therefore not properly before the Court. Furthermore, the Sixth Circuit's conclusion that the intent of the parties in this case was inconsistent with that of the parties in *Ute* is also not properly before the Court on a motion to dismiss, because it is unquestionably an issue of fact. *See Jones v. Sherrill,* 827 F.2d 1102, 1103 (6th Cir. 1987).

[10]Petitioner's position is that Section 1001(g) was added by Section 803 of ACA precisely to prevent such conclusion. By making the threshold assumption that a debtor's purchase of its own obligations under Section 1001 of OBRA serves to extinguish them, the Court of Appeals assumes away the critical statutory issue.

opinion and directly and irreconcilably in conflict with the opinion of the Colorado Supreme Court in *Ute.*

## II. The Sixth Circuit Court of Appeals Decided, as a Matter of First Impression in the Federal Courts, an Important Question of Federal Law, the Application of Section 1001(g) of OBRA, That Has Not Been, but Should Be Settled by this Court.

As the Sixth Circuit recognized, this case appears to present a question "of first impression in the federal courts," with only one other reported decision, the Ute decision, directly on point. 103 F.3d at pp. 40-41 (App., *infra,* 7a).

The question of the applicability of the curtailment and limitation of service prohibitions of 7 U.S.C. § 1926(b) to obligations purchased by FmHA debtors under OBRA, is one that potentially affects hundreds of water associations in numerous states, primarily in the Midwestern and Southeastern United States. Under OBRA, Congress directed the sale of obligations in amounts sufficient to realize net proceeds to the United States of not less than $1 billion in the 1987, $552 million in the 1988 and $547 million in the 1989 fiscal years. Without a determination by this Court, the question presented in this Petition is subject to repeated litigation in numerous different federal and state courts, and without guidance from this Court, the question presented in this Petition is subject to continued and repeated conflicting determinations.[11] Petitioner is advised that there are at least

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[11] The appeal to the Sixth Circuit of this case was interlocutory in the sense that SWI has a cross-complaint pending for injunctive relief to enforce the service area protections associated with its 1994 borrowing from the RECD. The question presented on this Petition has been fully and finally determined by the District Court and the Sixth Circuit, and nothing in the remainder of the case will affect this determination or reduce its importance. In fact, this determination will severely prejudice Water 1 with respect to the adjudication of SWI's cross-complaint.

two lawsuits currently pending in the federal and state courts involving in some way the question presented on this Petition.[12] Furthermore, this question could arise in litigation at any time in the future that there is an effort to curtail the service or limit the service area of a water district that purchased its notes under OBRA.

Furthermore, the applicability of the service area protections of 7 U.S.C. § 1926(b) are critical both to the purchaser districts, and also to the private lenders who financed these purchases. As explained by Judge Edith Jones in *City of Madison, Mississippi v. Bear Creek Water Association, Inc.*, 816 F.2d 1057 (5th Cir. 1987) (a copy of which appears at pages 79a through 93a of the Appendix), the congressional purposes of the service area protections as articulated in the legislative history are: "1) to encourage rural water development by expanding the number of potential users of such systems, thereby decreasing the per-user cost, and 2) to safeguard the viability and financial security of such associations (and FmHA's loans) by protecting them from the expansion of nearby cities and towns." *Id.* at p. 1060 (App., *infra*, 86a). Judge Jones gleaned these purposes from the following portion of the legislative history:

> "By interpretation, loans cannot now be made unless a major part of the use of the facility is to be by farmers. This section would broaden the utility of this authority somewhat by authorizing loans to associations serving farmers, ranchers, farm tenants, and other rural residents. This provision authorizes the very effective program of financing the installation and development of domestic water supplies and pipelines serving farmers and others in rural communities. By including

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[12] *E.g., Rural Water System #1 v. City of Sioux Center, Iowa*, Civ. No. C95-4112-MWB (N.D.W.D. IA). *Bell Arthur Water Corp. v. Greenville Utilities Commission, City of Greenville, N.C. and Ironwood Development, Inc.*, No. 4:95-CV-122-H(2) (E.D.E.D. NC).

> service to other rural residents, the cost per user is decreased and the loans are more secure in addition to the community benefits of a safe and adequate supply of running household water. A new provision has been added to assist in protecting the territory served by such an association against competitive facilities, which might otherwise be developed with the expansion of municipal and other public bodies into an area served by the rural system."

*Id.*, citing S. Rep. No. 566, 87th Cong., 1st Sess., *reprinted in* 1961 U.S. Code Cong. & Admin. News 2243, 2309 (App., *infra*, 85a-86a). See also, *Jennings Water, Inc. v. City of North Vernon*, 895 F.2d 311, 315 (7th Cir. 1989); *Ute* at p. 88 (App., *infra*, 46a).

The federal courts consistently have recognized the enormous significance of the service area protection provisions to the congressional purpose of extending rural water service and have therefore recognized that Congress intended a broad reading for 7 U.S.C. § 1926(b). *Jennings Water, Inc. v. City of N. Vernon, Indiana*, 895 F.2d 311, 315 (7th Cir. 1989). For example, the courts have refused to allow attacks on the protection based on the argument that debtor districts would not suffer economically if the curtailment and limitation of service provisions were violated. *Pinehurst Enterprises Inc. v. Town of Southern Pines*, 690 F.Supp. 444, 452, (M.D.N.C. 1988), *aff'd*, 887 F.2d 1080 (4th Cir. 1989) Judge Jones in *City of Madison, Mississippi v. Bear Creek Water Association, Inc.*, 816 F.2d 1057 (5th Cir. 1987), applied a bright-line rule to hold that the provisions preclude a municipality from condemning facilities that are located within the city limits throughout the FmHA loan term, 816 F.2d at p. 1059 (App., *infra*, 85a), reasoning that:

> "Even if fair value is paid for the lost facilities, such an action would inevitably have an adverse effect on the remaining customers of Bear Creek, in the form of lost

> economies of scale and resulting higher per-user costs. To allow expanding municipalities to "skim the cream" by annexing and condemning those parts of a water association with the highest population density (and thus the lowest per-user cost) would undermine Congress' purpose of facilitating inexpensive water supplies for farmers and other rural residents and protecting those associations' ability to repay their FmHA debts."

*Id.* at p. 1060 (App., *infra*, 86a-87a).

Thus, the service area protections are extremely critical to the financial viability of rural water districts and to the goal of Congress in creating the FmHA loan program of extending inexpensive water supplies to rural areas of America. Consequently, a debtor district would not lightly relinquish those protections. Contrary to the District Court's own unauthorized policy making adventure, uninformed by even the fact finding of a trial, a rural water district would not consider purchasing its notes or other obligations at a discount under Section 1001 of OBRA an adequate inducement to participate in the asset sale program if it knew that the service area protections would be lost in the transaction. This situation is reminiscent of that described in this Court's recent decision in *United States v. Winstar Corp.*, ___ U.S. ___, 116 S.Ct. 2432, 2472 (1996):

> "It would indeed, have been *madness* for respondents to have engaged in these transactions with no more protection than the government's reading would have given them, for the very existence of their institutions would then have been in jeopardy from the moment their agreements were signed."

Furthermore, because the FmHA community development loan program involved making loans to districts which would be unlikely to find sufficiently inexpensive financing

elsewhere,[13] debtor districts would need the benefits of continued protection for the term of the notes in order to obtain financing for the purchase of their notes.

The important question presented on this Petition, therefore, must be considered by this Court to prevent the rural water districts that came to the assistance of the Federal Government in a time of need for funds from suffering the unintended consequence of loss of service area protections that is threatened by the Sixth Circuit Court of Appeals decision in this case. This consequence was unintended by Congress, given the plain meaning of Section 1001(g) of OBRA ("all notes sold or intended to sold under this section"). This consequence was also unintended by the purchaser districts like Water 1, because, in addition to the statutory language of Section 1001(g) of OBRA, they received a right of first refusal under Subsection (f), which in common understanding means that they were being offered an opportunity to purchase their notes on the same terms and conditions as those being offered to third party purchasers.

Loss of service area protections places participating rural water districts at serious risk of having their customer base and perhaps their facilities taken by expanding municipalities through annexation or condemnation, thereby seriously damaging the financial ability of these districts to continue serving rural customers, especially those in the most remote and low density locations. This result would totally frustrate Congress' purpose in creating the rural community development loan program because of the misreading of OBRA, which was not designed to alter the loan program, but rather, to specifically preserve the integrity and effectiveness

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[13] *U. S. v. Kimball Foods, Inc.*, 440 U.S. 715, 735, 99 S.Ct. 1448, 1462 (1979).

of the loan program,[14] in the midst of efforts to develop funds to assist the Federal Government to move in the direction of a balanced budget.

## III. The Decision of the Sixth Circuit Court of Appeals Regarding an Important Question of Federal Law, the Application of Section 1001(g) of OBRA, Creates a True, Direct and Irreconcilable Conflict with the Relevant Decisions of this Court Concerning the Proper Judicial Construction of Federal Statutes.

This Court has frequently emphasized that the first step in the analysis of a federal statute is the determination of "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the Court, as well as the agency, must give effect to the unanimously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, n. 9, 104 S. Ct. 2778, 2781 (1984); *see also, Estate of Cowart v. Nicklos Drilling*, 505 U.S. 469, 478, 112 S.Ct. 2589, 2595 (1992).

Looking at Section 1001(g) of OBRA, Congress stated that the service area protections would continue to apply after sale, to "all notes or other obligations sold or intended to be sold under this section." There is no ambiguity in the word "all": it means every. There is no ambiguity in the phrase "notes or other obligations": it means evidences of the FmHA loans that Congress mandated be sold to raise funds for the government. There is no ambiguity in the phrase "sold": Section 1001 consistently uses the terms "sale", "sold", "purchase" and the like to refer to both the transactions with third parties and with debtor water dis-

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[14]See *Wayne v. Village of Sebring*, 36 F.3d 517 (6th Cir.1994), cert. den., ___ U.S. ___, 115 S.Ct. 2000 (1995).

tricts.[15] There is no ambiguity in the phrase "intended to be sold": Congress directed the Secretary of Agriculture to choose which loans to sell to achieve the prescribed net proceeds for the government each year of the program; those selected by the Secretary of Agriculture are those "intended to be sold" and concerning which the Secretary was required under subsection (f) to accord a right of first refusal to the debtor district involved. Finally, there is no ambiguity in the reference to "this section": it is the section in which subsection (g) is included — Section 1001 of OBRA; both sales to third parties and sales to debtor districts were effected pursuant to Section 1001.

There is, therefore, no ambiguity whatsoever in Section 1001(g) of OBRA: it extends the service area protections of 7 U.S.C. § 1926(b) to each and every note selected by the Secretary of Agriculture for sale, whether the sale was ultimately made to a third party or to the debtor water district, for the term stated in the note. This patent meaning of Section 1001(g), that it applies to both sales to third parties and sales to debtor water districts, is bolstered by the context of its passage. Subsection (g) was added by Section 803 of ACA, which added only one other subsection to Section 1001: subsection (f), requiring the Secretary of Agriculture to offer a right of first refusal *to the debtor water districts* with respect to the notes it selects for sale. Furthermore, the conclusion that service area protection applies to notes sold to both third parties and debtor districts, is consistent with the language in subsection (f), according a right of first refusal to the debtor water district. Given its

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[15] Section 803 of ACA, which added subsection (f) of Section 1001 to OBRA, the provision according a right of first refusal to debtor districts, is entitled: "Sale of Rural Development Notes." Section 1001(f) of OBRA refers to the transaction as involving a purchase ((1)(A), (3)(A)), an offer to sell ((1)(B)), sale ((3)(A), (3)(B)), and an obligation to be offered for sale ((2)(A), (3)(A)).

settled meaning in the law[16], there is no ambiguity in Congress' use of the phrase "right of first refusal": it is commonly understood to mean the extension of an offer to purchase on *the same terms and conditions* proposed to be given to a third party. Thus, the plain meaning of this phrase in subsection (f) is consistent with the plain meaning of the specific provision of subsection (g), the same terms and conditions concerning service area protection are provided to both third parties and debtor districts.

The District Court below seriously departed from this Court's settled principles of statutory construction by parsing the phrase "all notes or other obligations" to create an artificial barrier to giving effect to the inclusive word "all". The District Court focused separately upon the phrase "notes or other obligations" and questioned what universe of notes or other obligations was intended. The District Court then found this phrase ambiguous, concluded there was no settled administrative interpretation to which to defer and found no help in the legislative history. The District Court, therefore, proceeded to make its own policy. To do so, the District Court refused to read Section 1001 as a single statute, again seriously departing from this Court's precedents and settled principles of statutory construction. *United States v. Morton*, 407 U.S. 822, 828, 104 S.Ct. 2769, 2772 (1984); *DeSylva v. Ballentine*, 351 U.S. 570, 572, 76 S.Ct. 974, 976 (1956). The Court then focused upon the applica-

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[16] *See Field v. Mans*, 516 U.S. ____, 116 S.Ct. 437, 445-46 (1995): "It is . . . well established that '[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.' *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739, 104 L.Ed.2d 811, 109 S.Ct. 2166 (1989) (quoting *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329, 69 L.Ed.2d 672, 101 S.Ct. 2789 (1981)); see also *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322, 117 L.Ed.2d 581, 112 S.Ct. 1344 (1992)."

tion of 7 U.S.C. § 1926(b), rather than upon Section 1001(g), which it purported to be construing and which specifies the application of 7 U.S.C. § 1926(b) with respect to the asset sale program of OBRA. Based upon this backward approach, the Court construed Section 1001(g) as having no effect upon the application of 7 U.S.C. § 1926(b), except where the District Court made the policy choice that such incentive was required to effectuate the asset sale program: in the case of third party purchasers.

The effect of the District Court's opinion is also at odds with this Court's precedents and settled principles of statutory interpretation in that it renders the phrase "intended to be sold" mere surplusage. *Colautti v. Franklin*, 439 U.S. 379, 392, 99 S.Ct. 675, 684 (1979). Section 1001(g) provides that the prohibitions on curtailment or limitation of service "shall be applicable to all notes or other obligations *sold or intended to be sold under this section.*" Under the District Court's construction of Section 1001(g), the phrase "under this section" only refers to third party sales. The District Court does not specifically discuss the phrase "intended to be sold", and in effect treats it as mere redundancy at best. Even if this Court were to accept the District Court's interpretation of Section 1001(g), but give effect to the phrase "intended to be sold", the Court would find that the service area protections would apply to a note intended to be sold to a third party by the Secretary, but ultimately sold to the debtor district under the right of first refusal. This is the same result urged by the Petitioner.

Petitioner submits, though, that the phrase "intended to be sold" clearly expresses Congress' intent to prevent the very ruling that the District Court made. The phrase "intended to be sold" must have been included to emphasize the inclusiveness intended and that a sale to a debtor district should not be treated as automatically extinguishing the note for the purposes of application of 7 U.S.C. § 1926(b).

The Sixth Circuit opinion, merely endorses the District Court opinion as well-reasoned and seemingly adopts the District Court's conclusion that Section 1001(g) only extends the service area protections to third party purchases, without discussing the construction of the statute. Instead, the Sixth Circuit assumes away the issue of the meaning of Section 1001(g) by simply stating, without citation to legal precedent, that a repurchase of its notes by a debtor water district serves to extinguish the debt. In fact, the Sixth Circuit frames the issue before it in those terms. The Court of Appeals then focuses upon only one of the congressional purposes behind the service area protections — enhancement of the ability of the district to repay the debt to the government — and posits a requirement of 7 U.S.C. § 1926(b) that there be an obligation owing to the FmHA. Finally, the Sixth Circuit concludes that this requirement cannot be met in the case of debtor purchases. What this construction ignores, among other things, is that in the third party purchase situation the FmHA is cashed out and there is also no further debt owing to the FmHA. Thus, in the third party situation as well, there is no debt owing to the FmHA for which the congressional purpose to enhance the ability of the district to repay its debt to the government would be served. *See Ute* at pp. 94-95, n. 24 (App., *infra*, 62a). The Sixth Circuit's policy reasoning, then, does not support its decision because the provisions of Section 1001(g) would have equal effect upon third party and debtor water district purchases in terms of continuing the application of 7 U.S.C. § 1926(b) after sale.

Any search for legislative purposes, however, should not focus upon the provisions of 7 U.S.C. § 1926(b), but rather upon § 1001(g) of OBRA. In passing that provision Congress sought to make the notes as attractive as possible in order to enhance the market for the FmHA bonds and therefore maximize net proceeds for the government by continuing the service area protections to enhance the finan-

cial ability of the debtor water district to repay its debt. *Ute*, 960 P.2d at pp. 89-90, nn. 16, 17; 92 (App., *infra*, 49a-50a, 55a). This purpose would be served by continuing the service area protections, regardless of whether a third party or a debtor district purchased the notes. Such continuation would not only enhance the value of the notes to a third party purchaser, but also would make financing the purchase by a debtor water district of its own notes more attractive to a private lender. In essence, the debtor water district does the Secretary's job for him under the OBRA asset sale program by arranging the purchase transaction through acquisition of private financing for the purchase of its own notes.

To the extent that the Sixth Circuit bases the conclusion that a purchase of its notes by a debtor water district under OBRA results in an extinguishment of the debt to the FmHA upon the Secretary of Agriculture's marking Water 1's notes "paid in full" in the purchase transaction (103 F.3d at p. 42 (App., *infra*, 10a)) or its suggestion, in attempting to distinguish the Colorado Supreme Court's decision in *Ute*, that the intent of the parties was not to avoid discharging the instrument (*Id.*), these matters are not properly before it, let alone established, on a motion to dismiss under Federal Rules of Civil Procedure, Rule 12(b)(6). These matters are not alleged in Water 1's pleading. Furthermore, the intent of the parties is uniquely a question of fact, inappropriate for consideration on a motion to dismiss. *See McCormick v. United States*, 500 U.S. 257, 270, 11 S.Ct. 1807, 1815 (1991). To the extent the Sixth Circuit's decision is based upon its view of these facts, it seriously departs from and creates a true, direct and irreconcilable conflict with this Court's precedents. Wright & Miller, *Federal Practice and Procedure: Civil 2d* § 1366 at pp. 483-484 (1990) ("Rule 12(b) is not intended to permit the resolution of disputes . . . when there is a material issue of fact that justifies trial on the merits.")

To the extent that the Sixth Circuit's articulation that the Secretary of Agriculture treated the notes as discharged and that the intent of the parties was not to avoid discharging Water 1's bonds is a determination of and deference to an administrative interpretation of the Secretary of Agriculture, the Sixth Circuit's opinion seriously departs from and creates a true, direct and irreconcilable conflict with this Court's precedents concerning the proper construction of congressional statutes. In essence, from this perspective, the Sixth Circuit's opinion would circumvent this Court's *Chevron* decision and its progeny. Section 1001(g) is not ambiguous. Furthermore, as the District Court pointed out in its opinion (D.C.Op. at p. 14, n. 8. (App., *infra*, 22a-23a)), there is no contemporaneous settled administrative interpretation of Section 1001(g) to which it could defer. *See Good Samaritan Hospital v. Shalala*, 508 U.S. ___, 113 S.Ct. 2151, 2161 ("the consistency of an agency's position is a factor in assessing the weight that position is due"). The lack of such a contemporaneous settled administrative interpretation is exemplified by the divergence of the position taken by the Secretary of Agriculture with respect to Water 1's purchase transaction (marked the bonds "paid in full") and with respect to the Ute Water Conservancy District's purchase transaction (endorsed the bonds over to the district and directed the escrow agent to make payments on the bond to the district), both effected under Section 1001 of OBRA. See n. 5, *supra; Id.* at p. 2161 (citations omitted) (" 'an agency interpretation of a relevant provision which conflicts with the agency's earlier interpretations is "entitled to considerably less deference" than a consistently held agency view' "). If anything, the two purchase transactions demonstrate a willingness of the Secretary of Agriculture to bargain for the manner in which the transaction is treated.

The most important point, however, is that the issue is not the intent of the parties or the intent of the Secretary of Agriculture, or the view of the Sixth Circuit of the effect of

a purchase by a debtor water district of its own bonds, or the policy making determinations of the District Court. Rather, the key inquiry under the settled precedents of this Court is the meaning of the language of Section 1001(g) of OBRA. Section 1001(g) plainly and unambiguously states congressional policy that the service area protections are to continue for the term of any notes sold or even intended to be sold under OBRA, whether the sale is to a third party or to the debtor district. The Secretary of Agriculture is responsible for giving effect to this unambiguously expressed intent of Congress. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, n. 9, 104 S.Ct. 2778, 2781 (1984).

Finally, The Sixth Circuit's acceptance in its opinion of SWI's argument that Water 1's notes were discharged, not sold (103 F.3d at p. 42), is totally antithetical to the plain, unambiguous language of Section 1001, subsections (f) and (g), which repeatedly and solely utilize words of sale or purchase in describing the transaction. Furthermore, the statute does not require any "straw man" arrangement or other fiction, such as the one constructed by the Ute Water Conservancy District and the Secretary of Agriculture, in order for a purchaser district to enjoy continued service area protection.

For these reasons the decision of the Sixth Circuit is in true, direct, and irreconcilable conflict with the relevant decisions of this Court. Given the enormous importance of this issue to hundreds of rural water associations throughout numerous states, primarily in the Midwestern and Southeastern United States, the Sixth Circuit's clearly erroneous decision in this case should not be allowed to stand, but rather, this Court should grant the writ and provide proper guidance to the numerous federal and state courts that are facing or may in the future face the question presented on this Petition.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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## APPENDIX


Judgment of the Sixth Circuit Court of Appeals in *Scioto County Regional Water District No. 1, Authority v. Scioto Water, Inc., et al.*, entered on December 18, 1996 ..... 1a

Opinion of the Sixth Circuit Court of Appeals in *Scioto County Regional Water District No. 1, Authority v. Scioto Water, Inc., et al.*, 103 F.3d 38 (6th Cir. 1996) ..... 2a-10a

Opinion of the District Court for the Southern District of Ohio, Western Division in *Scioto County Regional Water District No. 1, Authority v. Scioto Water, Inc., et al.*, (unreported) ..... 11a-26a

Opinion of the Colorado Supreme Court in *City of Grand Junction v. Ute Water Conservancy Dist.*, 900 P.2d 81 (Colo. 1995) ..... 27a-66a

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## APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 95-3918

SCIOTO COUNTY REGIONAL WATER DISTRICT NO. 1, AUTHORITY,
*Plaintiff-Appellant,*

v.

SCIOTO WATER, INC.; DANIEL R. GLICKMAN, Secretary, U.S. Department of Agriculture,
*Defendants-Appellees.*

*Before: Suhrheinrich and Daughtrey, Circuit Judges; Johnstone, District Judge.*

### JUDGMENT

ON APPEAL from the United States District Court for the Southern District of Ohio at Cincinnati.

THIS CAUSE was head on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

Issued as Mandate: February 10, 1996
Costs: None
Filing Fee $
Printing $
Total $

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
Leonard Green, Clerk

A True Copy.

Attest: /s/ VALERIE FEEL
Deputy Clerk

Filed December 18, 1996
Leonard Green, Clerk
Received February 13, 1997

SCIOTO COUNTY REGIONAL WATER DISTRICT NO. 1, AUTHORITY,
Plaintiff-Appellant,
v.
SCIOTO WATER INC. and Daniel R. Gickman, Secretary, United States Department of Agriculture,
Defendants-Appellees.

No. 95-3918.

United States Court of Appeals,
Sixth Circuit.

Argued Oct. 11, 1996.
Decided Dec. 18, 1996.

1. Waters and Water Courses — 202

Agricultural Credit Act of 1987 subsection, providing that Consolidated Farm and Rural Development Act provision protecting federally financed water associations against curtailment shall be applicable to all notes or other obligations sold or intended to be sold under Agricultural Credit Act, did not apply to bond issuer that repurchases its own bonds from Farmers Home Administration (FmHA), effectively extinguishing them and, thus, regional water district was no longer entitled to protection provided by Consolidated Farm and Rural Development Act against curtailment, after district repurchased its own bonds that it had previously issued to FmHA; district's indebtedness to FmHA was marked "paid in full" and debt was thus discharged, not "sold." Consolidated Farm and Rural Development Act. §§ 306(b), 309A, as amended, 7 U.S.C.A. §§ 1926(b). 1929a note.

See publication Words and Phrases for other judicial constructions and definitions.

2. Waters and Water Courses — 182

One of main legislative purposes in enacting Consolidated Farm and Rural Development Act provision protecting federally financed water associations from curtailment was safeguarding Farmers Home Administration (FmHA) loans. Consolidated Farm and Rural Development Act, § 306(b), as amended, 7 U.S.C.A. § 1926(b).

3. Waters and Water Courses — 202

When bond issuer buys back its own bond it had issued to Farmers Home Administration (FmHA) and cancels debt, it no longer qualifies as "debtor" for protection from curtailment under Consolidated Farm and Rural Development Act provision protecting federally financed water associations against curtailment. Consolidated Farm and Rural Development Act, §§ 306(b), 309A, as amended, 7 U.S.C.A. §§ 1926(b), 1929a note.

See publication Words and Phrases for other judicial constructions and definitions.

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John W. Hurst (briefed), Schroeder, Maundrell, Barbiere & Powers, Cincinnati, OH, and Louis T. Rosenberg (argued and briefed), San Antonio, TX, for Plaintiff-Appellant.

Susanne M. Cetrulo (argued and briefed), Ware, Bryson, West, Bartlett, Kummer & Knapmeyer, Edgewood, KY, Steven Lee Mowery (briefed) Mowery, Brown & Blume, Wheelersburg, OH, and James Coombe (argued and briefed), Office of the U.S. Attorney, Cincinnati, OH, for Defendants-Appellees.

Before SUHRHEINRICH and DAUGHTREY, Circuit judges; JOHNSTONE,* District Judge.

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*The Honorable Edward H. Johnstone, United States District Judge for the Western District of Kentucky, sitting by designation.

DAUGHTREY, Circuit Judge.

Scioto County Regional Water District No. 1, Authority, the plaintiff in this action, is a regional water district that has operated in Ohio for 30 years. Although it previously had obtained financing through bonds issued to the Farmers Home Administration, the plaintiff repurchased the bonds and obtained private financing. When the defendant, a competitor, built a wellfield upstream from the plaintiff's wellfield, the plaintiff sought protection against the resulting limitation on its services, citing 7 U.S.C. § 1926(b), a provision in the Consolidated Farm and Rural Development Act that protects federally financed water associations from such competition. The district court, however, dismissed the action under Fed.R.Civ.P. 12(b)(6), finding that the plaintiff lost its statutory protection when it repurchased its Farmers Home Administration bonds and canceled its debt. We find no error and affirm the district court's judgment.

The plaintiff, Scioto County Regional Water District No. 1, Authority, referred to throughout this litigation as "Water 1," is a regional water district that has operated in Ohio since 1966. Defendant Scioto Water is a private, non-profit water supply corporation. Defendant Daniel Glickman is the Secretary of the United States Department of Agriculture, of which the Rural Economic and Community Development Service, formerly the Farmers Home Administration, is an agency.

To obtain funding for its water service, Water 1 issued several million dollars in bonds to the Farmers Home Administration[1] in the late 1960's and early 1970's. In 1969, Scioto Water became a non-profit corporation authorized to

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[1]Although the Farmers Home Administration is now known as the Rural Economic and Community Development Service, for the sake of simplicity, this opinion will refer only to the Farmers Home Administration.

install wells and operate a water distribution system. It, too, was funded with bonds sold to the Farmers Home Administration. Since the early 1970's however, Scioto Water has bought its water from Water 1 in order to supply customers; it does not produce water. In the early 1980's, Water 1 and Scioto Water modified their water purchase agreement to lower Scioto Water's maximum usage. However, as Scioto Water consistently has bought additional water since the date of the agreement, Water 1 has added surcharges to the cost of Scioto Water's additional water.

In 1989, Water 1 participated in a Farmers Home Administration program permitting bond issuers to buy back their government debt for a discounted amount. Water 1 refinanced its obligations through Star Bank and is no longer indebted to the federal government.

In the early 1990's, Scioto Water got approval for Farmers Home Administration loans for development of a wellfield two miles upstream from Water 1's wellfield and for a surface water treatment plant. Water 1 applied for a declaratory judgment, temporary restraining order, and an injunction, alleging that Scioto Water's project will harm Water 1's system and that the competition violates 7 U.S.C. § 1926(b). Water 1 alleged other federal and state law claims that are not at issue. Scioto Water moved to dismiss the complaint, and the district court concluded that it failed to state a claim upon which relief could be granted.

Title 7 U.S.C. § 1926, as part of the Consolidated Farm and Rural Development Act, governs federal loans made to water and waste facilities. Under this provision, the Secretary of Agriculture is authorized to make or insure loans to associations for water conservation, use, development, and

control projects, among other purposes. Section 1926(b) protects borrowing associations by providing that

> [t]he service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise or similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

In *City of Madison, Mississippi v. Bear Creek Water Ass'n,* 816 F.2d 1057, 1060 (5th Cir.1987), the Fifth Circuit explained that there are "two congressional purposes behind § 1926: (1) to encourage rural water development by expanding the number of potential users of such systems, thereby decreasing the per-user cost, and (2) to safeguard the viability and financial security of such associations (and [Farmers Home Administration's] loans) by protecting them from the expansion of nearby cities and towns."

As part of the Omnibus Budget Reconciliation Act of 1986, the Farmers Home Administration was required to sell some of the bonds it had acquired under the Consolidated Farm and Rural Development Act. *See Wayne v. Village of Sebring,* 36 F.3d 517, 526-7 (6th Cir.1994), *cert. denied,* — U.S. —, 115 S.Ct. 2000, 131 L.Ed.2d 1001 (1995). The Agricultural Credit Act of 1987 then required the Secretary to offer the issuer of such bonds the right to buy them back before the Secretary sold them to a third party. *See* Pub.L. 99-509, § 1001, 100 Stat. 1874, as amended by Pub.L. 100-233, § 803, 101 Stat. 1714 (1988) (*see* 7 U.S.C. § 1929a note "Sale of Rural Development Notes and Other Obligations") (referred to as "sub-

section (f)"). Also within the Agricultural Credit Act of 1987 was a provision known as "subsection (g)," stating that 7 U.S.C. § 1926(b), the curtailment prohibition, "shall be applicable to all notes or other obligations sold or intended to be sold" under the Agricultural Credit Act. *See* 7 U.S.C. § 1929a note ("Applicability of Prohibition on Curtailment or Limitation of Service"). The issue before this court then is whether subsection (g)'s provision that § 1926(b) applies to "all" obligations "sold or intended to be sold" means that § 1926(b)'s protection extends to a bond issuer, such as Water 1, that buys back its own bonds from the Farmers Home Administration, effectively extinguishing them.

This question appears to be one of first impression in the federal courts. The only reported decision directly on point comes from the Supreme Court of Colorado, which addressed this issue in *City of Grand Junction v. Ute Water Conservancy Dist.*, 900 P.2d 81 (Colo.1995). In that case, the rural water district had issued Farmers Home Administration bonds to finance growth in its system. It bought back its own bonds in 1988 pursuant to the same legislation that prompted Water 1's purchase of its bonds. The water district then brought a declaratory judgment action alleging that it maintained the exclusive right to provide water service, and it sought an injunction against the City's efforts to provide water service to annexed areas within the water district. Although the City argued that the water district's bond was discharged when the water district purchased it from the Farmers Home Administration, the Colorado court found that the water district's reacquisition of the bond did not discharge the debt, and that subsection (g) allowed the Farmers Home Administration to sell bonds without eliminating § 1926(b) protection for the issuer. Because subsection (g) extended § 1926(b) protection to "all notes or other obligations sold or intended to be sold" under the Agricultural Credit Act, the court concluded that § 1926(b)

protection should continue even if the bond issuer purchased its own bonds. *Id.* at 92. The court believed that because subsection (f) gave bond issuers the "right of first refusal" before the Farmers Home Administration sold the bonds, and was placed in the same act with subsection (g), that Congress meant to create a "comprehensive scheme" that allowed bond issuers to maintain § 1926(b) protection even after they purchased their own bonds. *Id.* In reaching this conclusion, however, the court carefully observed that state law permitted a bond issuer to reacquire its own bond without extinguishing the debt. *Id.* at 93.

[1] No other court has addressed the issue of whether a bond issuer that repurchases its own bonds may claim continued protection under 7 U.S.C. § 1926(b). In light of this scant case law, the plaintiff argues that bond issuers, such as itself, that exercised their right to buy back their bonds are entitled to the same § 1926(b) curtailment protection that is available to third-party bond purchasers. Water 1 argues that the coupling of subsections (f) and (g) of the Agricultural Credit Act means that the bond issuer's right of first refusal incorporates the right to continued protection against curtailment. It relies on common law, stating that when a seller makes a "unilateral option contract" and receives an offer from a third party, it must make both the price and terms of the offer available to one with a right of first refusal. Citing *W. Texas Transmission, L.P. v. Enron Corp.*, 907 F.2d 1554, 1561-9 (5th Cir.1990), *cert. denied*, 499 U.S. 906, 111 S.Ct. 1105, 113 L.Ed.2d 215 (1991), Water 1 insists that it is therefore entitled to the same § 1926(b) protection that would have been available to a third-party purchaser of its bonds. *W. Texas Transmission*, however, concerned a natural gas supplier's right of first refusal to repurchase a pipeline, and applied Texas law to the terms of a particular contract.

Scioto Water first responds that Water 1 failed to raise the issue of the common law right of first refusal at the trial level and has therefore waived the issue. *Bannert v. Am. Can. Co.*, 525 F.2d 104, 111 (6th Cir.1975), *cert. denied*, 426 U.S. 942, 96 S.Ct. 2662, 49 L.Ed.2d 394 (1976). Then, addressing the merits, Scioto Water argues that Water 1 does not qualify for § 1926(b) protection. It first explains that the main purposes of the Agricultural Credit Act are to protect "the supply of running household water in rural areas" and to protect "the repayment of funds advanced for the implementation of such systems." *Rural Water Dist. No. 3 v. Owasso Utils. Auth.*, 530 F.Supp. 818, 823 (N.D.Okla.1979). It notes that in cases such as *Bear Creek, supra*, and *Glenpool Util. Servs. Auth. v. Creek County Rural Water Dist. No. 2*, 861 F.2d 1211 (10th Cir.1988), *cert. denied*, 490 U.S. 1067, 109 S.Ct. 2068, 104 L.Ed.2d 633 (1989), the infringing cities were found to have violated § 1926(b) only because the protected water districts were indebted to the Farmers Home Administration. Moreover, as the opinion in *Pinehurst Enterprises, Inc. v. Town of Southern Pines*, 690 F.Supp. 444 (M.D.N.C.1988), *aff'd*, 887 F.2d 1080 (4th Cir.1989), makes clear, the first element of a § 1926(b) violation is curtailment or limitation of service provided by a "covered association," and to be covered, the association must be indebted to the Farmers Home Administration.

As well as arguing that Water 1 is not entitled to protection under § 1926(b) itself, Scioto Water contends that the Agricultural Credit Act did not alter Water 1's current ineligibility for curtailment protection. Scioto Water points out that Water 1's indebtedness to the Farmers Home Administration was marked "paid in full" and insists that the debt was thus discharged, not sold. We agree.

Finally, Scioto Water contends, correctly we conclude, that the decision in *Ute Water* is distinguishable. In that

case, the Colorado court found that § 1926(b)'s protection extends to those that buy back bonds only if the bonds are reacquired "with the intent not to discharge the instrument." 900 P.2d at 92. The *Ute Water* court analyzed the question of intent and looked to Colorado law to determine whether the acquisition of a bond discharged the debt. Unlike the loan documents in *Ute Water*, the loan documents in this case were marked "paid in full."

[2, 3] We note that cases brought in federal court under 7 U.S.C. § 1926(b) have consistently emphasized the requirement of federal indebtedness to obtain § 1926(b) protection. When an issuer buys back its own bond and cancels the debt, however, it no longer qualifies as a debtor for § 1926(b) protection. This statutory interpretation is also faithful to one of the main legislative purposes in enacting § 1926(b) — safeguarding Farmers Home Administration loans. Although the government maintains an interest in providing affordable rural water service, its interest in protecting against competition diminishes as its loans are repaid. We also note that Water 1's reliance on the common law "right of first refusal" does not alter this outcome, which must be gleaned from the federal statutes themselves rather than from such sources as Texas common law.

In a well-reasoned opinion, the district court held that 7 U.S.C. § 1929a note, subsection (g), applies only to obligations sold by the Farmers Home Administration to third parties. It therefore concluded that Water 1, having repurchased its own bonds, was no longer entitled to the protection provided by § 1926(b) and had failed to state a claim for relief under that section of Title 7. As a result, the district court entered judgment for defendant Scioto Water. We AFFIRM that judgment.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

SCIOTO COUNTY REGIONAL WATER
DISTRICT NO. 1, AUTHORITY
*Plaintiff,*

v.

SCIOTO WATER, INC., et al.,
*Defendants.*

**ORDER**

This matter is before the Court upon the following documents: (1) Application for Preliminary Injunction, Permanent Injunction, and Mandamus Order filed by Plaintiff Scioto County Regional Water District No. 1, Authority (Water 1) (Doc. no. 5), opposing memoranda filed by Defendant Scioto Water, Inc. (SWI) (Doc. no. 17) and Defendant Richard Rominger (Doc. no. 20), and Water 1's reply (Doc. no. 29); (2) Water 1's Application for Temporary Restraining Order Pursuant to Fed. R. Civ. P. 65(b) (Doc. no. 11) and SWI's response (Doc. no. 21); (3) SWI's Motion to dismiss the Complaint (Doc. no. 16), Water 1's opposing memorandum (Doc. no. 28), and SWI's reply (Doc. no. 38); (4) Water 1's Motion for Partial Summary Judgment on Liability Pursuant to 7 U.S.C. §1926(b), as Amended (Doc. no. 27), SWI's response (Doc. no. 37), Rominger's response and counter-motion for summary judgment (Doc. no. 40), Plaintiff's reply (Doc. no. 50); (5) Water 1's Motion for Leave to file Memorandum to the Court With Supplemental Authority to Plaintiff's Previously Filed Motion for Partial Summary Judgment (Doc. no. 35) and SWI's opposing memorandum (Doc. no. 43); (6) Water 1's Motion for Leave to Supplement Amended Complaint (Doc. no. 23), and SWI's opposing memorandum (Doc. no. 33); (7) Plaintiff's Motion for

Leave to Supplement Memorandum in Opposition to Defendant SWI's Motion to Dismiss (Doc. no. 45), and SWI's response (Doc. no. 47); and (8) Plaintiff's Advisory to the Court (Doc. no. 53).

## I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff has filed an amended complaint in which it alleges a continuing violation by Defendants of 7 U.S.C. § 1926(b), as amended by the Agricultural Credit Act of 1987, P.L. 100-233 § 803(g). Plaintiff claims that this Court has federal jurisdiction under 28 U.S.C. § 1331; the Intergovernmental Cooperation Act, 31 U.S.C. §§ 6501, *et seq.*; the Administrative Procedure Act, 5 U.S.C. § 551; the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202; and the Mandamus and Venue Act, 28 U.S.C. § 1361. In addition, Plaintiff brings supplemental state law claims. Plaintiff alleges the facts set forth below in support of its federal and state claims.

Plaintiff Water 1 is a regional water district which constitutes a political subdivision of the State of Ohio pursuant to Ohio Rev. Code Ann. § 6119. Water 1 operates under Chapter 61 of the Ohio Revised Code and is regulated by the Ohio Environmental Protection Agency (OEPA). Since its inception in 1966, Water 1 has continuously provided, or made available, wholesale and retail water service within an eight-township area ??? eastern Scioto County, Ohio.

Defendant SWI is a private, non-profit water supply corporation. Defendant Richard Rominger is the Acting Secretary of the United States Department of Agriculture. The Rural Economic and Community Development Service (RECDS), formerly the Farmers Home Administration (FmHA), is an agency of the Department of Agriculture.

Between 1967 and 1973, Water 1 issued and sold to the FmHA bonds in the amount of $2,996,000. In 1975, after

having redeemed the initial bonds, Water 1 issued water refunding bonds in the amount of $2,473,000.

In 1972 SWI sought permission from Water 1 to become Water 1's permittee and to extend Water 1's transmission lines to areas in which Water 1 was obligated to provide service or to make service available. At some point prior to August of 1981, Water 1 and SWI entered into a wholesale water purchase agreement which limited SWI's maximum water usage. Under the agreement, Water 1 was the water producer, wholesale supplier, and retailer, and SWI was the bulk water purchaser and retailer. On August 20, 1981, Water 1 and SWI executed an agreement which modified the existing wholesale water purchase agreement to reduce SWI's maximum usage. The agreement also provided that Water 1 would permit SWI to purchase bulk water from the City of Portsmouth, Ohio, and that Water 1 would purchase from SWI certain water lines owned by SWI. The agreement further provided that Water 1 would guarantee the cost of water to SWI for a period of five years and that Water 1 would serve as an emergency backup supply for SWI in the Wheelersburg, Ohio area.

In 1989, Water 1 took advantage of the FmHA debt buy-out program mandated by Congress pursuant to the Omnibus Budget Reconciliation Act of 1986.[1] Water 1 refinanced its obligations with non-federal funding sources and issued bonds to "buy out" the discounted amount which it would otherwise have owned to the FmHA.[2]

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[1] Pertinent provisions of the Act authorized the FmHA to sell to third parties the types of notes and bonds which Plaintiff had issued and sold to the FmHA or, in the alternative, permitted debtors to secure discounts on their own debt owed to the FmHA by refinancing such debt.

[2] The amended complaint does not include the specific allegations contained in the foregoing sentence. However, it is necessary to set forth

Commencing in 1990-1991, SWI obtained approval of a new FmHA loan and grant for proposed development of a new wellfield two miles upstream from Water 1's wellfield, and for a supporting surface water treatment plant to provide a source of water independent from Water 1. In obtaining the approval, SWI failed to provide direct notice to Water 1 concerning its plans and provided falsified data to FmHA regarding future customer counts. On or about March 1, 1995, OEPA inspected the SWI project as a prerequisite to issuance of an operational permit.

## II. CLAIMS OF THE PARTIES

Water 1 alleges that SWI's project will impair its water system. Water 1 further contends that SWI's development of a stand-alone system violates the standing relationship between SWI and Water 1 and that such development is outside the permit, agreements and patterns and practices of the parties. Water 1 also asserts that in reliance upon revenues to be derived from the water purchase contract between the parties, which was to last for a term of 60 years, Water 1 incurred debt to finance expansion of improvements in its wellfield and treatment facility. Water 1 brings the following claims for relief on the above allegations: (1) SWI has violated 7 U.S.C. § 1926(b) by curtailing service provided, or made available, by Water 1 and thereby impairing Water 1's ability to repay its indebtedness; (2) FmHA has violated § 1926(b) by approving and financing the construction of SWI's treatment facilities and thereby impairing Water 1's service and its ability to repay its indebtedness;[3] (3) SWI has violated the Intergovernmental Cooperation

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these facts, which are undisputed, in order to provide a full understanding of the events giving rise to Water 1's claims.

[3]Water 1 moves for partial summary judgment on its claims under § 1926(b) on the ground that it is entitled to protection against curtailment under that provision.

Act, 31 U.S.C. § 6501, *et seq.*, by failing to provide notice to, and consult with, Water 1; (4) SWI's wellfield and facility will unreasonably cause harm to Water 1's wellfield and ground water treatment facility in violation of Ohio's reasonable use of underground or ground water doctrine; and (5) SWI has violated its obligation of good faith in the performance and enforcement of its contract and course of dealing with Water 1 by developing an alternative source of water to replace all, or a substantial part of, the water SWI purchases from Water 1.

Defendant SWI moves to dismiss the complaint on the following grounds: (1) the complaint fails to state a claim upon which relief can be granted; (2) the Court lacks jurisdiction to hear this matter because Water 1 does not have standing to bring this action pursuant to 7 U.S.C § 1926(b)[4]; (3) Water 1 has made no showing of irreparable harm and no showing of an inadequate remedy at law; (4) the complaint and request for injunctive relief is not verified or supported by affidavits; and (5) if the federal claims are dismissed, Water 1's remaining claims should be dismissed because of a lack of ancillary jurisdiction.

## III. MOTION FOR LEAVE TO SUPPLEMENT AMENDED COMPLAINT

On May 17, 1995, Water 1 filed a motion for leave to supplement the amended complaint to add as a basis of jurisdiction the All Writs Act, 28 U.S.C. § 1651, *et seq.*; to add a claim for injunctive relief pursuant to the Administrative Procedure Act, 5 U.S.C. § 706; to request a writ of mandamus against Defendant RECDS requiring it to under-

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[4]Although Defendants present this issue as one of standing, the question to be solved is whether Plaintiff has stated a claim for relief under the applicable federal law. Accordingly, the Court will determine whether dismissal is warranted pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim for relief.

take certain actions with regard to Defendant SWI; and to request additional relief. SWI opposes leave to supplement on the ground that there is no authority for Plaintiff to supplement the amended complaint.

Fed. R. Civ. P. 15(d) provides that the court may permit a party to serve a supplemental pleading setting forth events which have happened since the date of the pleading sought to be supplemented. The proposed supplemental amended complaint does not set forth subsequently occurring events. *It should therefore be captioned as a "Motion for Lease to Amend". The Court will grant Water 1 leave to amend pursuant to Fed. R. Civ. P. 15(a) since it has not acted with undue delay or bad faith, and amendment of the complaint at this early stage of the proceedings will not prejudice Defendants.*

## IV. MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDA

Water 1 seeks lease to file a supplemental memorandum together with five unpublished judicial decisions in support of its motion for partial summary judgment. The Court finds that Defendants would not be prejudiced by submission of the supplemental authorities. Further, it would serve the interest of justice to have all potentially applicable authorities before the Court for its consideration. Accordingly, lease to file the supplemental memorandum is granted.

Water 1 has also filed a document entitled "Plaintiff's Advisory to the Court", which includes copies of two recently issued judicial decisions. Although Water 1 has not requested leave of court to file the document, leave is required since the filing is an attempt to supplement previously filed memoranda. The Court will grant Water 1 leave to file the document since it will assist the Court to have the most current authorities before it when deciding this case.

Finally, Water 1 requests leave to supplement its memorandum in opposition to SWI's motion to dismiss. For the reasons stated above, Water 1 was granted leave to file the supplemental memorandum.

## V. STANDARD OF REVIEW

A Rule 12(b)(6) action to dismiss requires the Court to determine whether a cognizable claim has been pled in the complaint. The basic federal pleading requirement is contained in Fed. R. Civ. P. 8(a), which states that a pleading "shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief". *Westlake v. Lucas*, 537 F.2d 857, 858 (6th Cir. 1976). Rule 8(a)(2) operates to provide the defendant with "fair notice of what plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). A Court examines a complaint in light of the objectives of Rule 8 using the standard articulated in *Jones v. Sherrill*, 827 F.2d 1102, 1103 (6th Cir. 1987):

> In reviewing a dismissal under Rule 12(b)(6), the court must accept as true all factual allegations in the complaint. *Windsor v. The Tennessean*, 719 F.2d 155, 158 (6th Cir. 1983), *cert. denied*, 469 U.S. 826 (1984). The motion to dismiss must be denied unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle her to relief. *Id.* at 158; *Conley v. Gibson*, 355 U.S. 41 (1957).

The admonishment to liberally construe plaintiff's claim when evaluating a Rule 12(b)(6) dismissal does not relieve a plaintiff of his obligation to satisfy federal notice pleading requirements and allege more than bare assertions of legal conclusions. Wright, Miller & Cooper, Federal Practice & Procedure: § 1357 at 596 (1969). "In practice, a complaint . . . must contain either direct or inferential allegations respecting all the material elements to sustain a recovery

under some viable legal theory." *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984), *cert. denied*, 470 U.S. 1054 (1985) (*quoting In Re: Plywood Antitrust Litigation*, 655 F.2d 627, 641 (5th Cir. 1981), *cert. dismissed*, 462 U.S. 1125 (1983)); *see also Sutliff, Inc. v. Donovan Companies, Inc.*, 727 F.2d 648, 654 (7th Cir. 1984); Wright, Miller & Cooper, Federal Practice & Procedure: § 1216 at 121-23 (1969). The United States Court of Appeals for the Sixth Circuit has clarified the threshold set for a Rule 12(b)(6) dismissal:

> [W]e are not holding the pleader to an impossibly high standard; we recognize the policies behind Rule 8 and the concept of notice pleading. A plaintiff will not be thrown out of court for failing to plead facts in support of every arcane element of his claim. But when a complaint omits facts that, if they existed, would clearly dominate the case, it seems fair to assume that those facts do not exist.

*Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 437 (6th Cir. 1988); *O'Brien v. DiGrazia*, 544 F.2d 543, 546 n.3 (1st Cir. 1976), *cert. denied*, 431 U.S. 914 (1977). In its scrutiny of the complaint, a Court construes all well-pled facts liberally in favor of the party opposing the motion. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

## VI. OPINION

### A. Claim under 7 U.S.C. § 1926(b)

The threshold issue before the Court is whether Water 1 is entitled to the protection of the Consolidated Farm and Rural Development Act, 7 U.S.C. § 1921 *et seq.* Title 7 U.S.C. § 1926 governs loans made by RECDS (formerly

the FmHA)[5] to water and waste facilities. Section 1926(a) authorizes the Secretary to make or insure loans to associations to provide for the conservation, development, use, and control of water, among other purposes. Section 1926(b) prohibits the curtailment or limitation of service provided by any such association. Section 1926(b) states as follows:

> The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

The purposes of the statute are twofold: "(1) to encourage rural water development by expanding the number of potential users of such systems, thereby decreasing the per-user cost, and (2) to safeguard the viability and financial security of such associations (and FmHA's loans) by protecting them from the expansion of nearby cities and towns." *City of Madison, Miss. v. Bear Creek Water Ass'n., Inc.*, 816 F.2d 1057, 1060 (5th Cir. 1987). The federal courts have consistently interpreted § 1926(b) as imposing a brightline rule which prohibits encroachment upon services provided by FmHA-indebted water associations. *Id.* at 1059; *Pinehurst Enterprises, Inc. v. Southern Pines*, 690 F.Supp. 444, 451 (M.D.N.C. 1988), *aff'd. without op.*, 887 F.2d 1080 (4th Cir. 1989). Protection continues during the term of the indebtedness to the FmHA. *Bear Creek*, 816 F.2d at

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[5]For the sake of clarity, the Court will refer to the RECDS as the FmHA throughout this opinion.

1059; *See Glenpool Utility Services Authority v. Creek County Rural Water District No. 2*, 861 F.2d 1211, 1216 (10th Cir. 1988), *cert. denied*, 490 U.S. 1067 (1989).

The essential elements of a claim under § 1926(b) are (1) curtailment or limitation of a service, (2) provided by a covered association, (3) having a continued indebtedness under § 1926(b), and (4) having made service available. *Glenpool*, 861 F.2d at 1214; *Pinehurst*, 690 F.Supp. at 451-452.

Under the provisions of the Omnibus Budget Reconciliation Act of 1986 (OBRA), Congress ordered the FmHA to sell to private entities certain FmHA bonds, such as those which Water 1 had issued and sold to the FmHA. *Wayne v. Village of Sebring*, 36 F.3d 517, 526-527 (6th Cir. 1994), *cert. denied*, 115 S.Ct. 2000 (1995). The Agricultural Credit Act of 1987 amended OBRA to require that the Secretary of Agriculture first offer for sale to the issuer any notes or other obligations held under the Consolidated Farm and Rural Development Act. See Pub.L. 99-509, § 1001, 100 Stat. 1874 (1986), as amended by Pub.L 100-233, § 803, 101 Stat. 1714 (1988) (codified at 7 U.S.C. § 1929a note). Subsection (g) of the amendments provides that § 1926(b) "shall be applicable to all notes or other obligations sold or intended to be sold under this section".

Water 1 contends that although it refinanced its bonds with non-federal funding sources in 1989 and it is no longer indebted to the FmHA, it remains entitled to the protection of § 1926(b) under the above provisions. Water 1 claims that since FmHA "sold" its bonds to Water 1 under the debt buy-out program, the "sale" brings it within the purview of § 1929a note, subsection (g). Defendants counter that subsection (g) does not apply to obligations which a debtor has bought back from the FmHA at a discount. They claim that because Water 1 is no longer indebted to the FmHA, Water 1 is not entitled to the protections of § 1926(b).

The parties have cited several published and unpublished decisions in support of their respective position.[6] However, many of the cases are of little assistance because either the party that sought the protection of § 1926(b) was not the entity indebted to the FmHA (*see e.c. Pinehurst*, 690 F.Supp. at 452), or the complaining party clearly remained indebted to the FmHA. *See Jennings Water, Inc. v. North Vernon*, 895 F.2d 311 (7th Cir. 1989); *Bear Creek*, 816 F.2d at 1059; *Glenpool*, 861 F.2d at 1211. Further, while many of these cases set forth the proposition that continued indebtedness is a prerequisite to bringing a claim under § 1926(b), the cases do not address the specific issue of whether a party which was originally indebted to the FmHA, but which purchased its loan back at a discount, is entitled to the continuing protection of § 1926(b). Finally, although the United States Court of Appeals for the Sixth Circuit assumed in the case of *Wayne v. Village of Sebring* that the protection of § 1926(b) continued for the plaintiff after the FmHA had sold the plaintiff's bonds to a third party, the Court did not address whether § 1926(b) applies to a debtor who has bought back its own debt. *See Wayne*, 36 F.3d at 527.

The only case cited by the parties that directly addresses the scope of § 1929a note, subsection (g) and provides any supporting analysis is *Ute Water Conservancy District v. City of Grand Junction*, No. 92CA2026 (Colo. Ct. of Appeals, October 21, 1993), *aff'd.*, No. 93SC745 (Colo. Supreme Court, June 30, 1995).[7] The appellate court in *Ute* determined that the plaintiff water district was entitled to protec-

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[6]Defendant has also cited portions of the legislative history. However, the legislative history does not provide any insight with regard to the specific issue before the Court.

[7]While the *Ute* decisions have no precedential value in this district, the Court has examined the decisions in view of the dearth of authorities concerning the scope of § 1929a note.

tion under § 1926(b) even after it had purchased its bond from the FmHA. The court rejected the defendant's position that § 1929a note does not extend the protections of § 1926(b) to debtors who had purchased their own notes at a discount. The court relied on the fact that § 1929a note refers to "*all*" notes and obligations. The Supreme Court of Colorado affirmed the appellate court's decision. It also relied on use of the word "all" in subsection (g) and held that § 1926(b) "applies to all notes and bonds sold by the FmHA — including those reacquired by the issuer with the intent not to discharge the instrument . . ." The court found its interpretation to be consistent with the purposes of the governing legislation.

This Court disagrees with the conclusion that the language of § 1929a note, subsection (g) clearly encompasses those obligations which a debtor has purchased from the FmHA. Although § 1929a note explicitly states that it applies to "all" notes and bonds sold by the FmHA, the statute does not define the term "notes and bonds sold or intended to be sold". Therefore, it is necessary to look beyond the language of subsection (g) in order to determine the meaning of that term.[8]

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[8]Because the language of § 1929a note is not clear, the Court must defer to an interpretation of § 1929a note by the agency charged with its administration, so long as the interpretation is based on a permissible construction of the statute and does not frustrate congressional policy. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984); *F.E.C. v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981); *Wayne*, 36 F.3d at 527. In response to a request for an interpretation of the statute by counsel for Richard Rominger, the Office of General Counsel for the Department of Agriculture issued a letter to counsel stating its opinion that former borrowers who have paid off FmHA loans under the debtor buy-out program are not covered by the protection of § 1926(b). See Defendant Rominger's Response to Plaintiff's Motion for Preliminary Injunction, Exhibit B (Doc. no. 20). While the Court questions whether it must defer to an agency opinion expressed in such an informal manner, the

Upon a careful reading of all the pertinent statutory provisions, the Court concludes that subsection (g) does not apply to obligations which a debtor has purchased from the FmHA under the debtor buy-out program. The applicable loan provisions recognize two types of obligations: (1) those to be sold by the FmHA to third parties under § 1929a note, and (2) those to be offered to issuers for purchase under § 1929a note, as amended. Section 1929a note, as amended, subsection (f) differentiates between "a sale of a portfolio of note or other obligations "under this section" (referring to § 1929a note, which provides only for the sale of FmHA notes to third parties), and on offer to sell to the purchaser, the latter being an alternative which the Secretary must offer before conducting a sale "under this section". Provision (g) employs similar language, referring to "notes or other obligations sold or intended to be sold *under this section.*" (emphasis added). Attributing the same meaning to the phrase under both provisions, the obligations to which (g) refers are those sold to third parties under § 1929a note, as distinguished from those offered for sale back to debtors. Thus construed, § 1929a note, as amended, extends the protections of § 1929(b) only to those obligations sold by the FmHA to third parties pursuant to the dictates of OBRA.

This interpretation of § 1929a note is consistent with the purposes of the statutory scheme. OBRA mandated that the Secretary generate specified net proceeds by selling notes and other obligations held by it. The extension of loan protections to third-party purchasers would assist the Secretary in satisfying the OBRA requirements by offering an inducement for third parties to purchase FmHA obligations. On the other hand, offering the same incentive to debtors

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Court need not resolve this issue. Rather, the Court's interpretation of the statute, based on its independent analysis, is in conformity with the Department of Agriculture's interpretation.

who might wish to participate in the buy-out program would not necessarily further assist the Secretary in fulfilling the statutory mandates. This is so because the buy-out program offers another type of incentive for debtors to purchase their own loans; i.e., a reduction in the amount of debt owed to the FmHA. Accordingly, there is a rational basis for extending the protection of § 1926(b) to obligations sold by the FmHA to third parties, but not to those purchased by debtors through the buy-out program.

In addition, a debtor whose loan is sold by the FmHA to a third party has no control over the transaction and cannot be said to have voluntarily relinquished the benefits conferred by § 1926(b). It is reasonable that Congress desired to extend to a debtor in this situation the same protections the debtor would have received had the FmHA continued to own the debtor's obligation. In contrast, a debtor who opts to purchase its own loan at a discount acts of its own volition and can be said to have voluntarily relinquished any rights bestowed by FmHA ownership of the obligation, including the protection afforded by § 1926(b). These differences afford a rational basis for distinguishing between obligations sold to third parties and those bought back by debtors.

Based on the foregoing, the Court finds that § 1929a note, subsection (g), applies only to obligations sold by the FmHA to third parties. Accordingly, accepting Water 1's allegations as true, its bonds were not "sold or intended to be sold" within the meaning of § 1929a note, subsection (g), so as to entitle Water 1 to the protection against curtailment provided by § 1926(b). Because Water 1 is no longer indebted to the FmHA within the meaning of the pertinent statutory provisions, Water 1 has failed to state a claim for relief under § 1926(b).

B. Claims under Other Federal Statutes

Water 1 brings a claim against the FmHA for violation of the Intergovernmental Operation Act, 31 U.S.C. § 6501. In support of its claim, Water 1 alleges that it had no notice or opportunity to protest SWI's proposed development. However, Water 1 has failed to allege specific facts in support of its claim. Further, §6501 simply defines the terms used in the Act and does not create any substantive rights. Water 1 has failed to specify any other provision of the Act that the FmHA has allegedly violated. Accordingly, this claim must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

Water 1's claim for relief under this Administrative Procedure Act, 5 U.S.C. § 706, must also be dismissed. Section 706 simply sets forth the scope of review of agency action. Water 1 has failed to identify a specific substantive provision of the Act which the FmHA has allegedly violated.

Finally, neither the Federal Declaratory Act, the All Writs Act, nor the Mandamus and Venue Act create substantive rights. Rather, these provisions confer jurisdiction on the district court and create remedies. Water 1 has not alleged a violation of its substantive rights which would confer jurisdiction and entitle it to the relief available under these provisions.

## III. STATE LAW CLAIMS

Title 28 U.S.C. § 1367 provides that the district court may decline to exercise supplemental jurisdiction over a claim over which it has not original jurisdiction if the court has dismissed all claims over which it had original jurisdiction. Because the Court is dismissing all of Water 1's claims over which it arguably had original jurisdiction in this case, the Court declines to exercise supplemental jurisdiction over Water 1's state law claims.

## CONCLUSION

Plaintiff Water 1 has failed to state a claim for relief under 7 U.S.C. § 1926(b). Water 1 also does not have a claim for relief under the other federal statutes listed in the amended and the second amended complaints. Because Water 1 has failed to state a claim for relief under federal law, the Court declines to exercise supplemental jurisdiction over Water 1's state law claims.

Plaintiff Water 1's motions for leave to file supplemental memoranda and documents (Doc. nos. 35 and 45) and motion for leave to supplement the amended complaint (Doc. no. 23) are hereby GRANTED. Defendant SWI's motion to dismiss (Doc. no. 16) is hereby GRANTED. Plaintiff Water 1's application for injunctive relief (Doc. no. 5), application for a temporary restraining order (Doc. no. 2), and motion for partial summary judgment (Doc. no. 27) are DENIED as moot. This Order does not dispose of Defendant SWI's application for injunctive relief.

IT IS SO ORDERED.

/s/ SANDRA S. BECKWITH
Sandra S. Beckwith, Judge
United States District Court

CITY OF GRAND JUNCTION,
Petitioner/Cross-Respondent,
v.
UTE WATER CONSERVANCY DISTRICT,
Respondent/Cross-Petitioner.

No. 93SC745.

Supreme Court of Colorado,
En Banc.

June 30, 1995.

Water conservancy district brought declaratory judgment action against city, asserting exclusive right to provide water service to areas which lay within boundaries of both district and city. The District Court, Mesa County, David A. Bottger and Nicholas R. Massaro, JJ., held that district was entitled to provide water service to overlap areas, and city appealed. The Court of Appeals, 870 P.2d 593, affirmed in part, vacated in part and dismissed in part. City petitioned for certiorari, and district filed cross-petition. The Supreme Court, en banc, Lohr, J., held that: (1) federal statute prescribing that, during term of bond held by Farmers Home Administration (FmHA), water services provided by borrower cannot be curtailed or limited expressly preempts state law governing authority of public entity to provide domestic water service, and that statute and other applicable federal statutes implicitly preempt state law regulating discharge of debt evidenced by bond; (2) water conservancy district's repurchase of revenue bond from FmHA did not discharge underlying debt and thus, protection of statute prohibiting curtailment or limitation of water services continued beyond date of repurchase; (3) revenue bond was not discharged when district advance refunded bond; and (4) statute affording protection to district did not violate Tenth Amendment.

Affirmed.

[1] STATES — 18.91
360k18.91
Federal statute prescribing that, during term of bond held by Farmers Home Administration (FmHA), water services provided by borrower cannot be curtailed or limited expressly preempts state law governing authority of public entity to provide domestic water service, and that statute and other applicable federal statutes implicitly preempt state law regulating discharge of debt evidenced by bond. U.S.C.A. Const. Art. 6, cl. 2; Agricultural Act of 1961, § 306(b), as amended, 7 U.S.C.A. § 1926(b); Omnibus Budget Reconciliation Act of 1986, § 1001, 7 U.S.C.A. § 1929a note.

[1] WATERS AND WATER COURSES — 202
405k202
Federal statute prescribing that, during term of bond held by Farmers Home Administration (FmHA), water services provided by borrower cannot be curtailed or limited expressly preempts state law governing authority of public entity to provide domestic water service, and that statute and other applicable federal statutes implicitly preempt state law regulating discharge of debt evidenced by bond. U.S.C.A. Const. Art. 6, cl. 2; Agricultural Act of 1961, § 306(b), as amended, 7 U.S.C.A. § 1926(b); Omnibus Budget Reconciliation Act of 1986, § 1001, 7 U.S.C.A. § 1929a note.

[2] STATES — 18.5
360k18.5
"Actual conflict" occurs, for purposes of preemption doctrine, when it is impossible for private party to comply simultaneously with both state and federal laws, or when state law stands as obstacle to accomplishment and execution of full purpose and objective of Congress. U.S.C.A. Const. Art. 6, cl. 2.

[3] STATES 18.11
360k18.11
Federal law expressly preempts state law when statute contains explicit language demonstrating that Congress intended such preemption. U.S.C.A. Const. Art. 6, cl. 2.

[4] STATES — 18.7
360k18.7
Federal law implicitly preempts state law when federal law occupies field, i.e., preemption may be inferred, absent any express statutory language, from scheme of federal regulations so pervasive as to make reasonable inference that Congress left no room for states to supplement it. U.S.C.A. Const. Art. 6, cl. 2.

[5] STATES — 18.11
360k18.11
In order to ascertain whether federal statute implicitly preempts state law, court must determine intent of Congress in enacting federal law. U.S.C.A. Const. Art. 6, cl. 2.

[6] WATERS AND WATER COURSES — 202
405k202
Water conservancy district's repurchase of revenue bond from Farmers Home Administration (FmHA) did not discharge underlying debt, particularly given evidence that neither FmHA nor district intended to discharge or cancel bond and, thus, protection of federal statute prohibiting curtailment or limitation of water services provided by borrower continued beyond date of repurchase; statutory language extending protections of statute to "all" obligations sold by FmHA included reacquisition by issuer when parties intended bond to remain outstanding, and, under common-law principles, intent of parties dictated whether reacquisition of bond that was also negotiable instrument discharged debt or functioned simply as purchase and sale of instrument. Agricultural Act of 1961, § 306(b), as amended, 7

U.S.C.A. § 1926(b); Agricultural Credit Act of 1987, § 803(f, g), 7 U.S.C.A. § 1929a note.

See publication Words and Phrases for other judicial constructions and definitions.

[7] STATUTES — 188
361k188
When interpreting federal statute, courts first look to language of statute.

[8] STATUTES — 190
361k190
When Supreme Court's reading of statute is consistent with legislative history and purpose, no "rare and exceptional circumstances" exist for purposes of exception to general rule that when court finds terms of statute unambiguous, judicial inquiry is complete.

See publication Words and Phrases for other judicial constructions and definitions.

[9] STATUTES — 199
361k199

Word "all," for purposes of statutory construction, is unambiguous term.

See publication Words and Phrases for other judicial constructions and definitions.

[10] BONDS — 68
58k68
Under common-law principles, intent of parties dictates whether reacquisition by issuer of bond that is also a negotiable instrument discharges debt or functions simply as purchase and sale of instrument.

[11] UNITED STATES — 53(7)
393k53(7)
Federal statute providing that Secretary of Agriculture and subsequent purchasers of notes and other obligations sold by Secretary on nonrecourse basis shall be relieved of any responsibilities that might have been imposed had borrower remained indebted to Secretary relieves purchaser of note or bond held by Farmers Home Administration (FmHA) from any special obligation that FmHA had to borrower, but does not relieve borrower from obligation to repay debt. Agricultural Act of 1961, § 309A(e), as amended, 7 U.S.C.A. § 1929a(e).

[12] APPEAL AND ERROR — 1008.1(8.1)
30k1008.1(8.1)
Determining intent of parties involves factual finding that should not be disturbed on appeal unless clearly erroneous.

[13] WATERS AND WATER COURSES — 202
405k202
Revenue bond issued by water conservancy district to Farmers Home Administration (FmHA) was not discharged when district advance refunded bond, as would have terminated outstanding debt required for protections of federal statute prescribing that, during term of bond held by FmHA, water services provided by borrower could not be curtailed or limited; in altering source of repayment for revenue bond, district did not discharge its underlying obligation to repay FmHA. Agricultural Act of 1961, § 306(b), as amended, 7 U.S.C.A. § 1926(b).

[14] BONDS — 105
58k105
Advance refunding does not eliminate bond holder's fundamental right to payment on bond.

[15] WATERS AND WATER COURSES — 202
405k202
Statute prescribing that during term of bond held by Farmers Home Administration (FmHA) water services provided by borrower cannot be curtailed or limited required only that bond issued by water conservancy district to FmHA be outstanding, not that district be indebted to federal government. Agricultural Act of 1961, § 306(b), as amended, 7 U.S.C.A. § 1926(b).

[16] STATES — 4.16(l)
360k4.16(l)
Federal statute prescribing that during term of bond held by Farmers Home Administration (FmHA) water services provided by borrower cannot be curtailed or limited did not violate Tenth Amendment even where protection of statute was extended beyond water conservancy district's repurchase of bond from FmHA; federal interest of encouraging rural water districts to provide their services to rural residents through United States exists even after FmHA has sold bond issued by such district, and monopoly granted to conservancy district by statute was limited in time and geographic scope. U.S.C.A. Const.Amend. 10; Agricultural Act of 1961, § 306(b), as amended, 7 U.S.C.A. § 1926(b).

[16] WATERS AND WATER COURSES — 182
405k182
Federal statute prescribing that during term of bond held by Farmers Home Administration (FmHA) water services provided by borrower cannot be curtailed or limited did not violate Tenth Amendment even where protection of statute was extended beyond water conservancy district's repurchase of bond from FmHA; federal interest of encouraging rural water districts to provide their services to rural residents through United States exists even after FmHA has sold bond issued by such district, and monopoly granted to

conservancy district by statute was limited in time and geographic scope. U.S.C.A. Const.Amend. 10; Agricultural Act of 1961, § 306(b), as amended, 7 U.S.C.A. § 1926(b).

*83 Daniel E. Wilson, City Atty., City of Grand Junction, John P. Shaver, Asst. City Atty., Grand Junction, Grimshaw & Harring, P.C., Wayne B. Schroeder, Ronald L. Fano, Peter J. Whitmore, Denver, for petitioner/cross-respondent.

Williams, Turner & Holmes, P.C., Mark A. Hermundstad, William D. Prakken, Grand Junction, for respondent/cross-petitioner.

Geoffrey T. Wilson, Gen. Counsel, Colorado Municipal League, Denver, for amicus curiae Colorado Municipal League.

Justice LOHR delivered the Opinion of the Court.

The issues in this case arise out of a dispute between the Ute Water Conservancy District (District) and the City of Grand Junction (City) as to which entity has the authority to provide water to domestic water users in areas where the boundaries of the City and the District overlap. The primary issue in this case is whether a bond — originally issued by the District to the Farmers Home Administration (FmHA), an agency of the United States Department of Agriculture, and subsequently reacquired by the District — satisfies the outstanding debt requirement of the applicable federal statute, 7 U.S.C. § 1926(b) (1994). If the bond is still outstanding, section 1926(b) protects the District from competition and prevents the City from supplying water to domestic water users in the overlap areas, except to those domestic water consumers historically served by the City.

In a declaratory judgment action brought by the District, the Mesa County District Court held that the bond remained outstanding, with the result that the District is protected from competition by the City in the overlap areas

pursuant to section 1926(b). The district court rejected the District's alternative argument that it is a "municipality" for purposes of section 31-35-402(1)(b), 12B C.R.S. (1986), and therefore enjoys protection from competition by the City under that statute. On appeal, the Colorado Court of Appeals affirmed the trial court's judgment for the District based on section 1926(b) and vacated the trial court's ruling on the section 31-35-402(1)(b) issue as premature. Ute Water Conservancy Dist. v. City of Grand Junction, 870 P.2d 593 (Colo.App.1993). We granted certiorari to review the correctness of the court of appeals' resolution of those issues [FN1] and now affirm the judgment of the court of appeals.

> FN1. The City sought review of the § 1926(b) determination, and the District cross-petitioned for review of the ruling concerning § 31-35-402(1)(b). We granted certiorari on the following issues: Issues raised by petitioner City: 1. Whether the defeasance, payment, cancellation of indebtedness and purchase of a bond by its issuer, result in the discharge of the "underlying debt" to the bondholder, even though the purchase of the bond was structured by the issuer with the intent to preserve the "underlying indebtedness" to the bondholder. 2. Whether the protection of 7 U.S.C. § 1926(b) (1994) extends to a district which has purchased, paid and canceled its indebtedness on a defeased bond to Farmers Home Administration in a transaction structured by the District with the intent to preserve the "underlying indebtedness" to FmHA. 3. Whether the application of 7 U.S.C. § 1926(b) under the facts of this case violates the Tenth Amendment to the United States Constitution. Issues raised by cross-petitioner District: 4. Whether the District is a "municipality" for purposes of § 31-35-402(1)(b), 12B C.R.S. (1986), which provides that one municipality shall not furnish water service in

another municipality without the other municipality's consent. 5. Whether, under § 31-35-402(1)(b), 12B C.R.S. (1986), and other applicable Colorado law, the District has the exclusive right to provide water service to the areas that are included within both the District's boundaries and the City's boundaries.

*84 I.

The District, a water conservancy district that is a political subdivision of the State of Colorado, was created by decree of the District Court of Mesa County in 1956 in order to provide water service to domestic water users in an area surrounding the City. [FN2] See the Water Conservancy Act, §§ 37-45-101 to -153, 15 C.R.S. (1990 & 1994 Supp.) (providing for the creation and operation of water conservancy districts). Prior to the creation of the District, it was difficult for people in rural areas of Mesa County to obtain domestic water service. These people were forced to haul their water in tanks and store it in cisterns. Other rural residents who lived closer to the City were able to receive water from the City's system, but it was expensive and the service was inadequate. A group of residents who lived outside the City organized and created a water conservancy district in order to provide domestic water service in areas where service was lacking or deficient. The District first provided water service in 1964.

FN2. The parties entered into a Stipulation to Facts, dated September 30, 1991, which, together with the pleadings and testimony at trial, provide the basis for our factual background.

When the District was created in 1956, it surrounded the City but it did not overlap the City's boundaries. As the City expanded, however, the City annexed certain areas served by the District. We refer to these areas within the geographic boundaries of both the District and the City as

"overlap areas." In order to resolve conflicts as to which entity would provide water to consumers in overlap areas, the District and the City entered into two written agreements, in 1967 and 1976. [FN3] These agreements, however, failed to resolve the continuing disputes between the District and the City. Except for historical City service areas, the District has provided water to all new consumers in the overlap areas since 1967.

> FN3. The 1976 agreement was identical to the 1967 agreement, except for one paragraph dealing with bulk water rates, which is not directly relevant to the present dispute. The 1976 agreement (hereinafter referred to as the "Agreement") was operative when this litigation was initiated.

In order to keep pace with rapid growth, the District made various improvements to its system, and financed them through borrowings including loans evidenced and secured by the issuance of revenue bonds. In 1981, the district issued one such revenue bond, in the original principal amount of $3 million, to the FmHA. [FN4] The bond matures in 2021. The District subsequently conducted two transactions involving this 1981 revenue bond that form the basis of the City's contention that the obligation of the District on the bond has been discharged.

> FN4. For ease of reference, we refer to this bond as the "1981 revenue bond" throughout the opinion.

First, in 1983, the District refinanced the 1981 revenue bond through a transaction referred to as an "advance refunding" — whereby new bonds were sold and the proceeds of these new bonds were deposited in an escrow account and were used to pay the installments of principal and interest on the 1981 *85 revenue bond as they came due. The escrowed bond proceeds replaced the District's revenues as the security for the 1981 revenue bond, while

the District's revenues became the security for the new bonds.

Second, in 1988, the District reacquired the 1981 revenue bond from the FmHA pursuant to revenue generating legislation enacted by Congress, authorizing the FmHA to sell all notes and bonds in its possession without canceling the protection provided to rural water districts and their lenders under section 1926(b), which prescribes that during the term of a bond held by the FmHA the water services provided by a borrower cannot be curtailed or limited, [FN5] If the District, as the issuer of the bond, was allowed to reacquire the bond from the FmHA without discharging the debt, the District would remain under the protection of 7 U.S.C. § 1926(b) until the bond obligation is discharged or the bond reaches maturity in 2021.

> FN5. The Omnibus Budget Reconciliation Act of 1986 (OBRA), Pub.L. No. 99-509, § 1001, 100 Stat. 1874 (1986) (codified at 7 U.S.C. § 1929a note (1994)), directed the FmHA to sell notes and bonds in its possession in order to lower the federal deficit without removing the protection provided for rural water districts and their lenders under § 1926(b). The Agricultural Credit Act of 1987 (ACA), Pub.L. No. 100-233, § 803, 101 Stat. 1714 (1988) amended § 1001 of OBRA by adding new subsections (f) and (g). See ACA, §§ 803(f) & (g), 101 Stat. 1714 (codified at 7 U.S.C. § 1929a note (1994)). The new subsection (g) states that 7 U.S.C. § 1926(b) "shall be applicable to all notes or other obligations sold or intended to be sold under this section." ACA, § 803(g), 101 Stat. 1714 (codified at 7 U.S.C. § 1929a note (1994)). See Part II, infra, for a more detailed discussion.

In 1991, the District filed a complaint against the City in Mesa County District Court, seeking declaratory relief in

the form of a determination that the District was the only entity authorized to provide water to domestic water users in the overlap areas, except where the City historically has served consumers. The District asserted, among other things, that under the Agreement and, alternatively, under applicable Colorado law, the District was authorized to provide domestic water service in the overlap areas. [FN6] The City filed an answer and counterclaim asserting, among other things, that the District could not serve water in the overlap areas without the City's consent, citing section 31-35-402(1)(b), 12B C.R.S. (1986). The City further alleged that the District was obligated under the Agreement to sell certain facilities to the City. Alternatively, the City claimed that it could terminate the Agreement upon ninety days notice. [FN7] Both the City and the District relied upon the Agreement and Colorado law — specifically sections 31-35-401 to -417, 12B C.R.S. (1986 & 1994 Supp.), which govern a municipality's authority to provide water and sewage services — as the bases for their claims that each had the exclusive right to provide water in the overlap areas.

> FN6. In its memorandum brief in support of its motion for summary judgment, the District asserted that 7 U.S.C. § 1926(b) also prevented the City from competing with the District while the 1981 revenue bond remained unpaid.
>
> FN7. The district court agreed with the City and held that the City could terminate the Agreement as of December 31, 1992. The District did not appeal this determination. As conceded at oral argument, the City terminated the Agreement in 1992 during this litigation.

The District filed a Motion for Temporary Restraining Order and/or Preliminary Injunction, asserting that the City should be prohibited from providing domestic water service to new customers in the overlap areas, except those areas

served by the City prior to 1967. After a hearing, the district court denied the District's motion in an order dated January 10, 1992, because the District failed to demonstrate a danger of irreparable injury.

Upon the filing of cross-motions for summary judgment, the district court determined that the District was not a "municipality" under section 31-35-402(1) and thus it could not rely on that statute. [FN8] The district court #86 also concluded that the City was a "municipality" and the District must therefore obtain the City's consent before serving domestic water consumers in the overlap areas. The district court further ruled that there were disputed issues of fact relating to the applicability of 7 U.S.C. § 1926(b) and set those issues for trial. Specifically, the district court stated that "[i]f it is determined upon a hearing of this matter that there is any outstanding federal debt, 7 U.S.C. 1926(b) prohibits the curtailing of any service provided by a water district that is the recipient of federal funds."

> FN8. Section 31-35-402(1)(b) provides that a "municipality" has the following power: To operate and maintain water facilities or sewerage facilities or both for its own use and for the use of public and private consumers and users within and without the territorial boundaries of the municipality, but no water service or sewerage service or combination of them shall be furnished in any other municipality unless the approval of such other municipality is obtained as to the territory in which the service is to be rendered. § 31-35-402(1)(b), 12B C.R.S. (1986) (emphasis added).

The district court conducted a bench trial on several issues, including the applicability of the federal statute. Richard E. Mitchell (Mitchell), the District's bond counsel, testified as an expert witness in the fields of municipal finance and corporate finance. Mitchell testified that he represented the District in six bond transactions between

1980 and 1987, as well as in the District's reacquisition of the 1981 revenue bond. According to Mitchell, who structured the advance refunding transaction in 1983, the District remained liable if the escrow account was insufficient to make the requisite payments on the 1981 revenue bond. Mitchell further testified that in 1988, the District reacquired the bond from FmHA at the discounted price of approximately $1.5 million, but expressly structured the transaction to prevent a merger and to keep the bond outstanding, rather than simply extinguishing the debt. Mitchell testified that the transaction was structured in this manner in order to maintain the District's flexibility to sell the bond again in the future.

Upon conclusion of the bench trial, in an order dated July 17, 1992, the district court held "that 7 U.S.C. 1926(b) prohibits the City from providing water service to the overlap areas so long as the District's 1981 water revenue bond remains outstanding, which may be until July 1, 2021 (Exhibit 98)." [FN9] The district court "permanently enjoined the City from performing any act with respect to the District in violation of 7 U.S.C. 1926(b) . . . for the life of the subject debt." [FN10] The district court determined that the 1981 revenue bond was outstanding, expressly relying on the federal statutes and the expert testimony of Mitchell. The district court also found that "[t]he evidence is undisputed that in buying its bond from FmHA the District intended that the debt remain outstanding so the bond could be resold if necessary." The district court, however, rejected the District's argument that it was a "municipality" under section 31-35-402(l)(b) and therefore enjoyed the protections provided by that statute. The City appealed the district court's decision that 7 U.S.C. § 1926(b) applies in the present case. The District cross-appealed, contending, among other things, that the district court's determination on summary judgment that it was not

a "municipality" under section 31-35-402(1)(b) was erroneous.

FN9. The other issues resolved by the district court in its order dated July 17, 1992, are not before us.

FN10. In an order dated September 11, 1992, the district court denied the City's Motion to Amend Findings and Judgment, emphasizing that "in the event of any conflict between 7 U.S.C. 1926(b) and any contract provision or city ordinance, the former controls[.]" The district court also refused to address four additional issues related to 7 U.S.C. § 1926(b) raised for the first time by the City in its Motion to Amend Findings and Judgment, including the argument that the statute violates the Tenth Amendment to the United States Constitution.

The court of appeals affirmed the trial court's ruling that the District was entitled to the protection afforded by 7 U.S.C. § 1926(b) against the City's efforts to provide water in the overlap areas. Ute Water Conservancy Dist. v. City of Grand Junction, 870 P.2d 593 (Colo.App.1993). The court of appeals vacated the portion of the district court's summary judgment order dealing with the applicability of section 31-35-402(1) because consideration of that issue was premature and presented no justiciable controversy. Id. at 598-99. The City petitioned this court for certiorari to review the applicability of 7 U.S.C. § 1926(b) to the present case. [FN11] The District filed a crosspetition to review the *87 section 31-35-402(1)(b) issue. [FN12] We granted the petition and the cross-petition.

FN11. See issues 1 to 3, supra n. 1.

FN12. See issues 4 and 5, supra n. 1.

The City contends that the lower courts erred in finding that 7 U.S.C. § 1926(b) prohibits it from supplying water to

consumers in the overlap areas because the indebtedness required by section 1926(b) was discharged when the District purchased the bond from the FmHA in 1988 or, alternatively, when the District advance refunded the bond in 1983. The City also asserts that the court of appeals erred in implicitly ruling that section 1926(b) preempts state law. Finally, the City argues that under the facts of this case, 7 U.S.C. § 1926(b) violates the Tenth Amendment to the United States Constitution. We address each of the City's arguments in turn.

## II.

[1] The City first contends that the court of appeals erred in implicitly finding that the federal statutes preempt state law in resolving the present dispute. Contrary to the City's contention, we hold that the applicable federal statutes preempt state law in this case. [FN13] More precisely, we hold that: (1) section 1926(b) expressly preempts state law governing the authority of a public entity to provide domestic water service; and (2) section 1926(b) and other applicable federal statutes implicitly preempt state law regulating the discharge of debt evidenced by a bond.

> FN13. State common-law principles, however, also support our conclusion that the 1981 revenue bond remains outstanding. See Part III, infra, for a more detailed discussion.

[2][3][4] The preemption doctrine originates in the Supremacy Clause of the United States Constitution, which provides:

> This constitution, and the laws of the United States which shall be made in pursuance thereof . . .) shall be the supreme law of the land; and the judges in every state shall be bound thereby; anything in the constitution or laws of any state to the contrary notwithstanding.

U.S. Const. art. VI, cl. 2. We have recognized that federal law preempts state law when: (1) the federal law actually conflicts with state law; (2) the federal law expressly preempts state law; or (3) the federal law implicitly preempts state law. Banner Advertising, Inc. v. City of Boulder, 868 P.2d 1077, 1080-84 (Colo.1994); see also Cipollone v. Liggett Group, Inc., — U.S. — , — , 112 S. Ct. 2608, 2617-18, 120 L.Ed.2d 407 (1992). [FN14] Actual conflict occurs when it is impossible for a private party to comply simultaneously with both state and federal laws, see Banner, 868 P.2d at 1080, or when the state law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress. See, e.g., Ray v. Atlantic Richfield Co., 435 U.S. 151, 158, 98 S.Ct. 988, 994-95, 55 L.Ed.2d 179 (1978); Hines v. Davidowitz, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941); Evans v. Board of County Comm.'rs of County of Boulder, 994 F.2d 755, 760 (10th Cir.1993); Belgard v. United Airlines, 857 P.2d 467, 469 (Colo.App.1992), cert. denied sub nom. Belgard-Krause v. United Airlines, — U.S. — , 114 S.Ct. 1066, 127 L.Ed.2d 386 (1994). Federal law expressly preempts state law when the statute contains explicit language demonstrating that Congress intended such preemption. E.g., Cipollone, — U.S. at — 112 S.Ct. at 2617-18; see also Jones v. Rath Packing Co., 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977), reh'g denied, 431 U.S. 925, 97 S.Ct. 2201, 53 L.Ed.2d 240 (1977). Finally, federal law implicitly preempts state law when federal law occupies the field — that is to say, preemption may be inferred, absent any express statutory language, from a " 'scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.' " Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982) (quoting Rice v. Santa Fe Elevator *88 Corp., 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed, 1447 (1947)).

Implied preemption also exists when " 'the Act of Congress . . . touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.' " Id. However, " '[t]he exercise of federal supremacy is not lightly to be presumed.' " New York Dept. of Social Services v. Dublino, 413 U.S. 405, 413, 93 S.Ct. 2507, 2513, 37 L.Ed.2d 688 (1973) (quoting Schwartz v. Texas, 344 U.S. 199, 202-03, 73 S.Ct. 232, 235, 97 L.Ed. 231 (1952)); accord Rosa v. Warner Elec. Contracting, 870 P.2d 1210, 1212 (Colo.1994), cert. denied, — U.S —, 115 S. Ct. 69, 130 L.Ed.2d 25 (1994).

> FN14. The federal courts generally have been less rigid in classifying the various types of preemption. For example, the United States Supreme Court has recognized that "[i]n the final analysis, there can be no one crystal clear distinctly marked formula [to analyze federal preemption cases]." Hines v. Davidowitz, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941).

We begin our preemption analysis by examining section 1926(b), which expressly preempts state law to the extent that the statute protects the indebted entity from competition while the debt is outstanding. Section 1926(b) states:

> The service provided or made available through any such association [ [FN15]] shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such [FmHA] loan [to the District] . . .

> FN15. An "association" is an entity that has received a loan from the FmHA. Ute Water Conservancy Dist.,

870 P.2d at 596. See Part III, infra, for a more detailed discussion.

Consolidated Farm and Rural Development Act, Pub.L. No. 87-128, § 306, 75 Stat. 308 (1961) (codified at 7 U.S.C. § 1926(b) (1994)) (emphasis added). Thus, the language of section 1926(b) prohibiting an entity from curtailing or limiting the District's services expressly preempts state law governing the authority of a public entity to provide domestic water service. We must next determine whether the applicable federal law in the present case, including section 1926(b), implicitly preempts state commercial law on discharge of obligations on a bond.

[5] In order to ascertain whether a federal statute implicitly preempts state law, a court must determine the intent of Congress in enacting the federal law. See, e.g., Rosa v. Warner Elec. Contracting, 870 P.2d at 1212. Moreover, if a federal statute does not expressly preempt state law, "such an intention may be clear from the pervasiveness of the federal regulatory scheme, the need for national uniformity, or the danger of conflict between the enforcement of state law and the administration of federal programs." Rocky Mtn. Airways, Inc. v. Pitkin County, 674 F.Supp. 312, 319 (D.Colo.1987) (citing Pennsylvania v. Nelson, 350 U.S. 497, 76 S.Ct. 477, 100 L.Ed. 640 (1956)). We conclude that the legislative history of section 1926(b), the pervasiveness of the federal regulatory scheme, and the need for national uniformity support our conclusion that the applicable federal statutes preempt state law on discharge of bond obligations in the present case.

The legislative history of section 1926(b) demonstrates that Congress intended to protect rural water districts from competition in order to encourage rural water development. Senate Report No. 566, constituting part of the legislative history of section 1926(b), states:

> Section 306 [now codified as section 1926(b) would authorize loans to nonprofit associations and public or quasi-public agencies — for the conservation, development, use and control of water. . . . Under the Water Facilities Act, financial assistance is authorized to governmental and other agencies and to other persons. . . . However, the Water Facilities Act requires the benefits of such loans to be on farms. By interpretation, loans to associations cannot now be made unless a major part of the use of the facility is to be by farmers. This section would broaden the utility of this authority somewhat by authorizing loans to associations serving farmers, ranchers, farm tenants, and other rural residents. This provision authorizes the very effective program of financing the installation and development of domestic water supplies and pipelines serving farmers and others in rural communities. By including service to other rural residents, the cost per user is reduced and the loans are more secure in addition to the community *89 benefits of a safe and adequate supply of running household water. A new provision [7 U.S.C. § 1926(b) ] has been added to assist in protecting the territory served by such an association facility against competitive facilities, which might otherwise be developed with the expansion of the boundaries of municipal and other public bodies into an area served by the rural system.

S.Rep. No. 566, 87th Cong., 1st Sess., reprinted in 1961 U.S.C.C.A.N. 2243, 2309 (emphasis added). Federal courts have concluded that "[t]his history indicates two congressional purposes behind § 1926: (1) to encourage rural water development by expanding the number of potential users of such systems, thereby decreasing the per-user cost, and (2) to safeguard the viability and financial security of such associations (and FmHA's loans) by protecting them from the expansion of nearby cities and towns. "City of Madison, Mississippi v. Bear Creek Water Ass'n, Inc., 816 F.2d 1057,

1060 (5th Cir. 1987); see also Jennings Water, Inc. v. City of N. Vernon, Indiana, 895 F.2d 311, 315 (7th Cir.1989), aff'g 682 F.Supp. 421 (S.D.Ind.1988); Moore Bayou Water Ass'n, Inc. v. Town of Jonestown, Mississippi, 628 F.Supp. 1367, 1370 (N.D.Miss.1986). Furthermore, courts have recognized that "[t]he statute's legislative history confirms that the Congress intended a broad reading for section 1926(b)." Jennings Water, Inc., 895 F.2d at 315; accord North Shelby Water Co. v. Shelbyville Mun. Water & Sewer Comm'n, 803 F.Supp. 15, 21 (E.D.Ky.1992). Therefore, the legislative history of section 1926(b) demonstrates that Congress enacted this statute in order to protect rural water districts, as well as loans made to those districts, and supports our conclusion that Congress implicitly intended to preempt any state law that intrudes into this field of federal interest. We next examine the other applicable federal statutes and conclude that they also implicitly preempt state law.

The pervasiveness of the federal regulatory scheme governing the sale of bonds held by the FmHA demonstrates that Congress intended that these federal laws preempt state laws governing bond redemption. As part of an overall effort to reduce the federal deficit, Congress enacted section 1001 of the Omnibus Budget Reconciliation Act of 1986 (OBRA). This statute, in pertinent part, states:

> (a) Sales Required. — The Secretary of Agriculture . . . shall sell notes and other obligations held in the Rural Development Insurance Fund established under section 309A of the Consolidated Farm and Rural Development Act in such amounts as to realize net proceeds to the Government of not less than [specified amounts in specified years].

Omnibus Budget Reconciliation Act of 1986, Pub.L. No. 99-509, § 1001, 100 Stat. 1874 (1986) (codified at 7 U.S.C. § 1929a note (1994)). Congress subsequently en-

acted section 803 of the Agricultural Credit Act of 1987 (ACA), which amended section 1001 of OBRA by adding new subsections (f) and (g). Subsections (f) and (g) state, in relevant part:

> (f) Right of First Refusal. —
>
> (1) In General. — Before conducting a sale of a portfolio of notes or other obligations under this section, the Secretary of Agriculture shall —
>
> (A) determine whether the issuer of any unsold note or other obligation desires to purchase the note or other obligation; and
>
> (B) if so, hold open for 30 days, an offer to sell the note or other obligation to the issuer at a price to be determined under paragraph (2).
>
> ....
>
> (g) Applicability of Prohibition on Curtailment or Limitation of Service. — Section 306(b) of the Consolidated Farm and Rural Development Act (7 U.S.C. 1926(b)) shall be applicable to all notes or other obligations sold or intended to be sold under this section.

The Agricultural Credit Act of 1987, Pub.L. No. 100-233, § 803, 101 Stat. 1714 (1988) (codified at 7 U.S.C. § 1929a note (1994)) (emphasis added). We conclude that Congress intended that this type of pervasive statutory scheme — which provides the issuer with a right of first refusal and expressly applies the provisions of section 1926(b) for protection against curtailment or limitation of *90 service to "all notes or other obligations sold or intended to be sold under this section, — preempt state law pertaining to the sale of bonds held by the FmHA.

Moreover, Congress surely did not intend to allow each state to decide independently whether a bond held by the FmHA would be discharged upon advance refunding or

reacquisition by the issuer under that particular state's version of the Uniform Commercial Code. The Congressional purpose underlying section 1926(b) is to protect rural water districts, which should include all rural water districts, not just those districts in states with favorable versions of the Uniform Commercial Code . The other such purpose is to protect federal loans to those districts. [FN16] Thus, the federal government has an interest in regulating FmHA loans and the bonds that evidence the district's obligations for such loans, and in ensuring uniform treatment in every state for purchasers and issuers of those bonds. [FN17] Therefore, the pervasiveness of the federal regulations and the need for national uniformity provide further support for our conclusion that Congress intended that the applicable federal statutes preempt state law on bond redemption in the present case.

FN16. Additionally, in enacting the comprehensive ACA, Congress intended to facilitate the sale of FmHA loans in a secondary market. See pp. 26-27, infra.

FN17. This is somewhat analogous to the federal government's interest in regulating federal bonds, which has been held to preempt state laws that interfere with the federal regulations. See, e.g., Free v. Bland, 369 U.S. 663, 669, 82 S.Ct. 1089, 1093-94, 8 L.Ed.2d 180 (1962). In that case, the Court held that federal regulations concerning a right of survivorship in United States savings bonds preempted conflicting state community property law provisions. The Court stated: "The success of the management of the national debt depends to a significant measure upon the success of the sales of the savings bonds. The Treasury is authorized to make the bonds attractive to savers and investors." Id. (footnote omitted). Although the United States Government was not the bond issuer in the present

case, Congress enacted revenue generating legislation designed to reduce the federal deficit by encouraging the FmHA to sell bonds and notes in its possession.

III.

The City contends that the 1981 revenue bond is no longer outstanding and thus the District is no longer protected by section 1926(b). We begin our analysis of this issue by examining 7 U.S.C. § 1926(b), which states:

> The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association [the District] within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such [FmHA] loan [to the District]; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

Consolidated Farm and Rural Development Act, Pub.L. No. 87-128, § 306, 75 Stat. 308 (1961) (codified at 7 U.S.C. § 1926(b) (1994)) (emphasis added). Therefore, to receive the protection of this statute the District must be an "association" and the FmHA loan must be outstanding.

The City does not dispute that the District is an "association" under section 1926(b). Ute Water Conservancy Dist., 870 P.2d at 596; see Pinehurst Enterprises, Inc. v. Town of S. Pines, 690 F.Supp. 444, 452 (M.D.N.C.1988) (defining "any such association" under 7 U.S.C. § 1926(b) as "an entity which has received a loan from the Secretary (FmHA)"), aff'd, 887 F.2d 1080 (4th Cir.1989) (without published opinion). Rather, the City contends that the District lost the protection afforded under this statute either

when it repurchased the 1981 revenue bond from the FmHA in 1988, or advance refunded the 1981 revenue bond in 1983. The City's contention is based on the premise that either of these two transactions was sufficient to discharge the 1981 revenue bond under state law, thereby terminating the requisite outstanding debt under section 1926(b). For the reasons stated below, we disagree.

*91 A.

[6] The City first contends that the underlying debt evidenced by the 1981 revenue bond was discharged when the District repurchased the bond from the FmHA in 1988. The City argues that under the Uniform Commercial Code (UCC), as adopted in Colorado, and state common law, the underlying debt was discharged when the District repurchased the 1981 revenue bond. [FN18] Contrary to the City's position, however, the applicable federal statutes, as well as state common-law principles support the court of appeals' conclusion that the District's reacquisition of the 1981 revenue bond did not discharge the underlying debt.

> FN18. More precisely, the City contends that Article 3 of the UCC should be looked to for guidance on the issue of discharging a bond because Article 8 of the UCC, which deals with securities, is silent on this issue. See E.F. Hutton & Co. v. Manufacturers Nat'l Bank of Detroit, 259 F.Supp. 513, 517 (E.D.Mich.1966). According to the City, under the law established by several sections in Article 3, including §§ 4-3-601(2) & (3), 4-3-603, and 4-3-802(1)(b), 2 C.R.S. (1992), the 1981 revenue bond was discharged when the District reacquired it in 1988.

1. Federal Statutory Law

The plain language of section 803(g) of the ACA authorizes the FmHA to sell notes and bonds in its possession

without eliminating the protection provided under section 1926(b) for the bond issuer. The District asserts that section 803(g) applies to all notes and bonds sold by the FmHA, including those sold back to the issuer. The City disagrees, arguing that the underlying debt required by section 1926(b) was discharged when the FmHA sold the bond back to the District, the issuer. Section 803(g) extends the protection of section 1926(b) to "all notes or other obligations sold or intended to be sold under this section." ACA, § 803(g), 101 Stat. 1714 (codified at § 1929a note (1994)) (emphasis added). We must determine whether Congress intended that "all . . . obligations sold . . . under this section" include reacquisition by an issuer of a bond held by the FmHA, where the parties intended not to discharge the bond. Because section 803(f) of the ACA provides a comprehensive scheme for selling bonds held by the FmHA back to the issuers, we conclude that Congress intended to authorize the type of transaction that occurred in the present case.

[7][8] When interpreting a federal statute, courts first look to the language of the statute. See, e.g., Rubin v. United States, 449 U.S. 424, 429-30, 101 S.Ct. 698, 701-02, 66 L.Ed.2d 633 (1981) ("When we find the terms of a statute unambiguous, judicial inquiry is complete, except in 'rare and exceptional circumstances.' ") (quoting Crooks v. Harrelson, 282 U.S. 55, 60, 51 S.Ct. 49, 50, 75 L.Ed. 156 (1930)). When our reading of the statute is consistent with the legislative history and purpose, as in the present case, no such "rare and exceptional circumstances" exist. See id. at 430, 101 S.Ct. at 701. Therefore, we are guided by the unambiguous language in section 803(g), extending the protection of section 1926(b) to "all notes or other obligations sold or intended to be sold under this section." ACA, § 803(g), 101 Stat. 1714 (codified at § 1929a note (1994)) (emphasis added). This language supports our conclusion

that the 1981 revenue bond was not discharged when the District reacquired the instrument from the FmHA in 1988.

[9] The word "all" is an unambiguous term. Hudgeons v. Tenneco Oil Co., 796 P.2d 21, 23 (Colo.App. 1990); see also O'Brien v. Village Land Co., 780 P.2d 1, 2-3 (Colo.App.1988) (stating that the word "all," used in a deed, is an unambiguous term meaning "the whole of, the whole number or sum of, or every member or individual component of"), rev'd on other grounds, 794 P.2d 246, 250 (Colo. 1990). The dictionary definition and common usage of the word "all" do not provide for an exception or exclusion that is not expressly specified. See, e.g., Cedar Rapids Community School Dist. v. City of Cedar Rapids, 252 Iowa 205, 106 N.W.2d 655, 659 (1960); see also 3 Words and Phrases 212-25 (1953 & 1994 Supp.). Black's Law Dictionary defines the word "all" as: "The whole number or sum of — used collectively, with a plural noun or pronoun expressing an aggregate. Every member of [sic] individual component of; each one of — used with a plural *92 noun." Black's Law Dictionary 74 (6th ed. 1990). Section 803(g) does not provide for any exception to the general rule that the protection provided to rural water districts under section 1926(b) "shall be applicable to all notes or other obligations sold or intended to be sold under this section" and we decline to create such an exception. See ACA, § 803(g), 101 Stat. 1714 (codified at 7 U.S.C. § 1929a note (1994)) (emphasis added). [FN19] Therefore, after considering the plain language of section 803(g), we hold that it authorized the FmHA to sell all notes or other obligations without removing the protection provided to rural water districts under section 1926(b), including selling the 1981 revenue bond back to the issuer when the parties intended that the bond remain outstanding.

FN19. In a situation analogous to the present case, the United States Court of Appeals for the Tenth Circuit

> held that a federal statute, 12 U.S.C. § 1823(c)(2)(A), preempted Colorado's version of the UCC — prohibiting the assignment of a letter of credit — because the federal "statute clearly gives FDIC/Corporation the authority to purchase 'any assets' of a failed bank." Federal Deposit Ins. Corp. v. Bank of Boulder, 911 F.2d 1466, 1472-73 (10th Cir.1990) (en banc) (emphasis added), cert. denied, 499 U.S. 904, 111 S.Ct. 1103, 113 L.Ed.2d 213 (1991). The court further held "that section 1823(c)(2)(A) creates a power in FDIC/Corporation to purchase any assets, including assets nontransferable under state law." Id. at 1473.

The fact that Congress provided for a comprehensive scheme for selling bonds held by the FmHA back to the issuers also supports our conclusion that Congress intended to allow an issuer to reacquire its bond or note without losing the protection provided under section 1926(b). See ACA, §§ 803(f) & (g), 101 Stat. 1714 (codified at 7 U.S.C. § 1929a note (1994)). We agree with the district court that:

> By including this provision [section 803(g)] in the same act which gave the rural water associations the right of first refusal to purchase their obligations from FmHA, Congress obviously intended that associations which exercise this right would still enjoy the protection of 7 U.S.C. 1926(b) so long as the obligation existed. This conclusion accords with Congress' intent in enacting section 1926(b) not only to protect FmHA loans but to promote rural water development, as noted above.

Trial Court Order of July 17, 1992, at 4.

Although the language of section 803(g) provides a sufficient basis for us to resolve this issue, our conclusion is fully consistent with the purpose of section 1926(b) and section 803(g). As the Colorado Court of Appeals recog-

nized in the present case, "the purpose of 7 U.S.C. § 1926(b) is:

> 'to assist in protecting the territory served by such an association against competitive facilities, which might otherwise be developed with the expansion of municipal and other public bodies into an area served by he rural system.' "

Ute Water Conservancy Dist., 870 P.2d at 596 (quoting Jennings Water, Inc., 895 F.2d at 315 (quoting from S.Rep. No. 566, 87th Cong., 1st Sess., reprinted in 1961 U.S.C.C.A.N. 2243, 2309)). Section 803(g) was enacted as part of the ACA, which has been referred to as "the most comprehensive and far-reaching legislation addressing the delivery of agricultural credit in many years." H.R.Rep. No. 100-295(I), 100th Cong., 1st Sess. 53, reprinted in 1987 U.S.C.C.A.N. 2723, 2725. One of the primary purposes of enacting this comprehensive legislation was to create an improved secondary market for FmHA loans, See id. at 54, reprinted in 1987 U.S.C.C.A.N. at 2725-26. Our conclusion that Congress intended that section 803(g) apply when the bond issuer reacquires the instrument is consistent with the purpose, as well as the terms, of the ACA. Therefore, we hold that section 1926(b) applies to all notes and bonds sold by the FmHA — including those reacquired by the issuer with the intent not to discharge the instrument, as in the present case — and that the District did not discharge the 1981 revenue bond when it reacquired the instrument from the FmHA in 1988.

2. State Law

[10] State law also supports our conclusion that the 1981 revenue bond was not discharged when the District reacquired the instrument in 1988. Under common-law principles, the intent of the parties dictates *93 whether the reacquisition by the issuer of a bond that is also a negotiable

instrument discharges the debt or functions simply as a purchase and sale of the instrument.

Colorado's version of the Uniform Commercial Code (UCC) does not provide clear guidance as to how to answer the question before us of whether a bond is discharged when reacquired by the issuer. [FN20] We therefore look to state common-law principles to supplement the UCC as adopted in Colorado. § 4-1-103, 2 C.R.S. (1992) ("Unless displaced by the particular provisions of this title, the principles of law and equity . . . shall supplement its provisions.").

> FN20. Article 8 of the UCC applies to certificated securities, including the 1981 FmHA bond, which can also be negotiable instruments. See. § 4-8-105, 2 C.R.S. (1992). Article 8 provides for purchases where the purchaser acquires the same rights as those of the seller. See §§ 4-8-301, -313, 2 C.R.S. (1992). Article 8 contains no specific provision on discharge and does not prevent an issuer from reacquiring its own security. Although Article 3 of the UCC, concerning negotiable instruments, expressly states that it does not apply to investment securities, § 4-3-103(l), 2 C.R.S. (1992); see § 4-8-102(l)(d), 2 C.R.S. (1992), other authority supports the proposition that courts may look to Article 3 for "guidance" when Article 8 is silent, because a bond can also be a negotiable instrument, see, e.g., E.F. Hutton & Co. v. Manufacturers Nat'l Bank of Detroit, 259 F.Supp. 513, 517 (E.D.Mich.1966); see also 12 Am.Jur.2d Bonds § 51 (1964 & 1995 Supp.); 11 C.J.S. Bonds § 63 (1938 & 1994 Supp.). Section 4-3-601 governs the discharge of debt under Article 3, but does not provide clear guidance as to how to answer the question before us.

Case law supports our conclusion that the intent of the parties dictates whether the repurchase of a bond, which is also a negotiable instrument, by the issuer discharges the

underlying debt or merely functions as an acquisition of the instrument. [FN21] See, e.g., Fidelity & Columbia Trust Co. v. Louisville Railway Co., 258 Ky. 817, 81 S.W.2d 896, 899 (1935) (citing numerous cases and secondary authorities to support its conclusion that: "The rule recognized without exception by American courts is that a corporation may purchase its own bonds and reissue them where there is a manifest intention to keep them alive."); see also 2 Leonard A. Jones, The Law of Bonds and Bond Securities § 608, at 11-12 (4th ed. 1935) (stating that private corporations can reacquire bonds that they have issued and subsequently reissue those bonds "[i]f the facts show that, in reacquiring the bonds there was no intention that they should thereby be paid. . . ."); 11 C.J.S. Bonds § 61 (1938 & 1994 Supp.) ("Delivery of a bond, with the intention and direction that it be canceled, to the obligor, or a third person, extinguishes the bond.") (footnotes omitted); see generally Columbia Savings v. Zelinger, 794 P.2d 231, 234-36 (Colo.1990) (stating that the intent of the parties determines whether a debt was discharged under Article 3 of the UCC). In the present case, the intent of the parties involved in the 1988 transaction (i.e., the FmHA and the District) was to keep the 1981 revenue bond active and not discharge the debt after the District repurchased the instrument from the FmHA. Although the FmHA had no further rights or obligations under the 1981 revenue bond, neither the FmHA nor the District intended to discharge or cancel the bond. This conclusion is supported by expert testimony, trial exhibits, and the findings of the trial court.

> FN21. The City also argues that under common-law principles, the bond was discharged, citing Fitch v. Hammer, 17 Colo. 591, 31 P. 336 (1892). That case and other cases cited by the City, however, support the proposition that payment by one of several joint debtors upon a negotiable instrument discharges the debt as to

all of the joint debtors, which is not the situation in the present case.

First, the District's bond counsel, Richard E. Mitchell, who structured the 1988 transaction, in which the District repurchased the 1981 revenue bond from the FmHA, testified as an expert witness at trial that the transaction was structured to effectuate the District's intent to reacquire the bond without discharging the underlying debt in order to enable the District to resell the bond in the future. The City provided no expert testimony to the contrary.

Second, a letter dated June 28, 1988, from the FmHA and the District to the escrow agent directed the escrow agent to make payments of principal and interest on the 1981 bond, as they came due, to the District *94 after the District repurchased the bond. This letter demonstrates that the District intended that the bond remain outstanding, even though the District was at that time both the holder of the bond and the debtor.

[11] Third, the instrument itself demonstrates that the FmHA transferred the 1981 revenue bond to the District, but did not intend to cancel it. By endorsing the back of the instrument, the FmHA transferred the bond to the District rather than marking the bond "paid in full," which would have canceled or discharged the debt. Mitchell contrasted other transactions involving the reacquisition of a bond held by the FmHA in which the issuer paid the FmHA and received its bonds marked "paid in full" on the face of the instruments. The manner in which the FmHA executed and transferred the instrument provides concrete evidence to support our conclusion that the FmHA, as well as the District, intended that the 1981 revenue bond remain outstanding after the District reacquired the instrument in 1988. [FN22]

FN22. The City further contends that Congress left the FmHA with no discretion to leave a debt or obligation outstanding upon selling the 1981 revenue bond back to the issuer. The City cites 7 U.S.C. § 1929a(e) (1994), which states that "[t]he Secretary and any subsequent purchaser of such notes and other obligations sold by the Secretary on a nonrecourse basis shall be relieved of any responsibilities that might have been imposed had the borrower remained indebted to the Secretary." We do not find the City's argument persuasive. Rather, we agree with the District that § 1929a(e) relieves the purchaser of a note or bond held by the FmHA from any special obligation that the FmHA had to the borrower, but this statute does not relieve the borrower from the obligation to repay the debt.

[12] Fourth, the trial court determined that the parties intended that the debt not be discharged and stated that the evidence to this effect was "undisputed." Determining the intent of the parties involves a factual finding that should not be disturbed on appeal unless clearly erroneous. See Zelinger, 794 P.2d at 235. Specifically, the district court concluded that "the District's mere acquisition of its bond [did not] extinguish the obligation." In determining that the bond is still outstanding, the trial court expressly found the expert testimony of the District's bond counsel, Mitchell, to be more persuasive than evidence relied upon by the City. [FN23] Therefore, state law principles, the evidence in the present case, and the district court's findings all support our conclusion that the District repurchased the bond without discharging the underlying debt.

FN23. The City had argued that footnotes to the District's financial statements provided evidence that the District redeemed, or paid off, the 1981 revenue bond because the notes contained the word "re-

> deemed." The context of the footnotes as a whole, however, does not suggest that the bond was discharged. Rather, the footnotes state that: Upon redemption of the Water Revenue Bonds, Series 1981, the District received the right to all future payments from the trust [paid by the escrow agent]. Payments from the trust are due on January 1, and July 1 of each year through July 1, 2021 [the maturity date of the 1981 revenue bond].

B.

[13] The City alternatively contends that the 1981 revenue bond was discharged when the District advance refunded the bond in 1983. The applicable federal statutes, as well as state common-law principles, however, do not support the City's contention.

As noted above, the purpose of 7 U.S.C. § 1926(b) is to protect rural water districts, as well as loans made to those districts. E.g., City of Madison, 816 F.2d at 1060. Moreover, Congress intended that section 1926(b) be read broadly. Jennings Water, Inc., 895 F.2d at 315. In altering the source of repayment for the 1981 revenue bond, the District did not discharge its underlying obligation to repay the FmHA. Allowing the District financial flexibility while at the same time protecting the FmHA's loan is fully consistent with the well-established purposes of section 1926(b).

The evidence presented to the trial court in the present case further supports our conclusion that the advance refunding transaction did not discharge the 1981 revenue bond. We agree with the court of appeals that:

> Here, although the original lien on the district revenues brought about by the 1981 bond issue was discharged, those revenues were at the same time encumbered *95 by the refunding issue of 1983. The district's indebtedness

> thus remains, even though the source of repayments for the 1981 bonds has shifted to the escrowed funds. Furthermore, should the escrowed funds be insufficient, the shortfall would be made up from district revenues, which are also the basis of payment for the 1983 bonds.

Ute Water Conservancy Dist., 870 P.2d at 597. Mitchell, the District's bond counsel, testified that the District remained liable to pay the debt if the newly created escrow account was ever insufficient. Therefore, Mitchell's expert testimony, which was not controverted by any expert testimony for the City, supports the conclusion that the 1983 advance refunding transaction did not discharge the District's obligation to make payments to the FmHA on the 1981 revenue bond. See id. (citing 2416 Corp. v. Board of Trustees, 209 Ill.App.3d 504, 154 Ill.Dec. 276, 282-83, 568 N.E.2d 276, 282-83 (1991) (stating that the trial court can rely on "an expert's opinion on the meaning to be ascribed to terms of art in a specialized area of the law")).

[14][15] State law principles governing advance refunding transactions also support our conclusion that the 1981 revenue bond was not discharged as a result of the 1983 transaction. "As refunding bonds are issued to refinance an outstanding issue, they do not create a new obligation but are considered to be an extension of the obligation of the original bonds." 2416 Corp., 154 Ill.Dec. at 278, 568 N.E.2d at 278; see also 1 Jones §§ 393-94, at 423-25. An advance refunding does not eliminate a bondholder's fundamental right to payment on the bond. See Morton Arboretum v. Thompson, 605 F.Supp. 486, 490-92 (N.D.111.1984); Hammerman v. Illinois State Toll Highway Auth., 148 Ill.App.3d 259, 101 Ill.Dec. 471, 474-75, 498 N.E.2d 795, 798-99 (1986). Therefore, we hold that the 1983 advance refunding transaction did not discharge the District's obligation to make payments on the 1981 revenue bond to the FmHA. [FN24]

FN24. The City also argues that the federal courts have interpreted § 1926(b) as requiring "continuing indebtedness." See, e.g., Glenpool Utility Services Auth. v. Creek County Rural Water Dist. No. 2, 861 F.2d 1211, 1214 (10th Cir.1988), cert. denied, 490 U.S. 1067, 109 S.Ct. 2068, 104 L.Ed.2d 633 (1989). The City suggests that § 1926(b) requires an outstanding debt to the federal government. We reject this position because § 1926(b) requires only that the bond be outstanding, it does not require that the District be indebted to the federal government. The unambiguous language of the OBRA, and its subsequent amendments under the ACA, make it clear that the protection provided for rural water districts under § 1926(b) remains even when the FmHA sells a note or bond in its possession to an entity other than the federal government. ACA, § 803(g), 101 Stat. 1714 (codified at 7 U.S.C. § 1929a note (1994)). In fact, Congress enacted the OBRA, and subsequent amendments under the ACA, in order to ensure that the protection provided for in § 1926(b) would remain intact even after the FmHA sold the note or other obligation to a third party or the issuer. The City's argument, in effect, would have us ignore both the clear language and the purpose of the federal statutes. Although we agree with the City that the District is no longer obligated to the FmHA under the 1981 revenue bond, we do not agree with the City that the bond is no longer outstanding. Moreover, we agree with the City to the extent that the "continuing debt" requirement simply paraphrases the statutory requirement that the bond be outstanding in order to qualify for the protection provided under § 1926(b). As noted throughout this opinion, however, we conclude that the 1981 revenue bond remains outstanding and thus § 1926(b) protects the District from

competition in the overlap areas until the bond is discharged or reaches maturity.

## IV.

[161 Lastly, the City argues that under the facts of the present case, 7 U.S.C. § 1926(b) violates the Tenth Amendment to the United States Constitution. [FN25] The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. Const. amend. X. Specifically, the City argues that the power of Congress to enact section 1926(b) rests upon the spending clause of the United States Constitution, see *96 U.S. Const. art. I, § 8, cl. 1, which is subject to various limitations. [FN26] Application of section 1926(b) would exceed several of these limitations, the City argues, if it is applied after the District has paid off and purchased the bond from the FmHA. The City bases its argument on the premise that because the FmHA is no longer the bond holder, there is no federal interest involved.

FN25. The District asserts that the City failed to raise its Tenth Amendment challenge in a timely manner and thus has waived this argument. For the limited purpose of disposing of this particular issue, we assume that the City raised its Tenth Amendment challenge in a timely manner.

FN26. Article I, § 8, cl. 1, of the United States Constitution provides: "The congress shall have power . . . [t]o lay and collect taxes, duties, imposts and excises; to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

Contrary to the City's assertion, however, we conclude that the federal interest of encouraging rural water districts to provide their services to rural residents throughout the United States exists even after the FmHA has sold a bond issued by such a district. The legislative history of section 1926(b) supports our conclusion that Congress intended that section 1926(b) protect rural water districts, as well as the federal loans made to them. The City's argument would have us ignore one of the two clear purposes of enacting section 1926(b) and focus exclusively on protecting federal loans, which we cannot do. Thus, we conclude that the federal interest of encouraging rural water districts to provide water services to rural residents throughout the country, and the protection afforded to those rural water districts under section 1926(b), exists even when the water district is no longer indebted to the federal government.

Furthermore, section 1926(b) does not violate the Tenth Amendment when "[t]he limits on the provision of water service are thus restricted in time and in scope so as not to disable the city severely from performing its governmental function." City of Madison, 816 F.2d at 1061. In City of Madison, the Fifth Circuit Court of Appeals recognized that section 1926(b) limits a city's provision of water service but "does not, however, permanently curtail the city's authority [to provide water service], because it applies only while the federal debt is outstanding." Id. Accordingly, the court upheld the constitutionality of section 1926(b) against a Tenth Amendment challenge. Id.; see also Glenpool, 861 F.2d at 1216.

Applying the analysis of City of Madison to the present case, we conclude, as did the court of appeals, that section 1926(b) does not violate the Tenth Amendment to the United States Constitution because the monopoly granted to the District is limited in time and geographic scope. Ute Water Conservancy Dist., 870 P.2d at 598 (citing City of

Madison, 816 F.2d 1057). First, the duration of the protection provided to the District under section 1926(b) is limited by the outstanding debt requirement, i.e., until the bond is discharged or reaches its maturity in 2021. Thus, the City is prevented from providing water services only during the period of time that the 1981 revenue bond remains outstanding. As in City of Madison, "[a]t most, [s]ection 1926(b) ordains a dual water authority function within a municipal area for a period of time." City of Madison, 816 F.2d at 1061. Second, the geographic scope of the protection provided to the District under section 1926(b) is limited to the overlap areas. The City is free to provide water service within its territorial boundaries, where the City's territory does not overlap the District's territory. Therefore, these temporal and geographic limitations establish that section 1926(b) is consistent with the Tenth Amendment. We hold that section 1926(b), as applied in the present case, does not violate the Tenth Amendment to the United States Constitution.

## V.

On cross-petition, the District conditionally raises two issues for us to review regarding whether the District is a "municipality" with the exclusive right to provide water service in the overlap areas under Colorado law. See issues 4 and 5, supra n. 1. Because we hold that the 1981 revenue bond is outstanding, thereby preventing the City from providing water service in the overlap areas, we need not address the issues raised by the District on cross-petition. We therefore affirm the court of appeals' decision to vacate the district court's summary judgment ruling that the City is a "municipality" under section *97 31-35-402(1)(b), 12B C.R.S. (1986), while the District is not a "municipality" under that statute. Ute Water Conservancy Dist., 870 P.2d at 598-99.

## VI.

In sum, we hold that the District is entitled to the protection provided under 7 U.S.C. § 1926(b) — which prohibits the City from providing domestic water service in the overlap areas, except to those existing customers that it has historically served — until the 1981 revenue bond is discharged or reaches its maturity in 2021. We conclude that the applicable federal statutes preempt state law. We further conclude that the unambiguous language and purpose of the federal statutes, state common-law principles, and the district court's findings of fact support our conclusion that the District did not discharge the 1981 revenue bond when it reacquired the instrument in 1988; nor did the District discharge the bond when it conducted an advance refunding transaction in 1983. Because we resolve the present case in favor of the District, we need not, and do not, address the conditional issues raised by the District in its cross-petition. Accordingly, we affirm the judgment of the court of appeals.

COLORADO COURT OF APPEALS
No. 92CA2026
October 21, 1993

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UTA WATER CONSERVANCY DISTRICT,
*Plaintiff-Appellee and Cross-Appellant,*
v.
CITY OF GRAND JUNCTION,
*Defendant-Appellant and Cross-Appellee.*

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Appeal from the District Court of Mesa County
Honorable David A. Bottger, Judge
Honorable Nicholas R. Massaro, Judge
No. 91CV26H

Division II
Opinion by JUDGE NEY
Tursi and Taubman, JJ., concur

JUDGMENT AFFIRMED IN PART,
VACATED IN PART, AND
APPEAL DISMISSED IN PART

Opinion Modified, and As Modified,
Petition for Rehearing DENIED

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Williams, Turner & Holmes, P.C., Mark A. Hermundstad,
William D. Prakken, Grand Junction, Colorado, for
Plaintiff-Appellee and Cross-Appellant

Daniel E. Wilson, City Attorney, John P. Shaver,
Assistant City Attorney, Grand Junction, Colorado;
Grimshaw & Harring, P.C., Wayne B. Schroeder,
Ronald L. Fano, Peter J. Whitmore, Denver, Colorado,
for Defendant-Appellant and Cross-Appellee

Defendant, City of Grand Junction (city), appeals the judgment of the trial court entered in favor of plaintiff, Ute Water Conservancy District (district). Plaintiff cross-appeals that judgment. We affirm in part, vacate in part, and dismiss the appeal in part.

The district was formed in 1956 to supply water to certain unincorporated areas of Mesa County. At that time, the city was surrounded by the district, but there was no overlap of the city's and the district's boundaries.

This lack of overlap ended when the city annexed territory within the boundaries of the district. These annexations resulted in controversy over which entity, the city or the district, would provide water service in areas which lay within the boundaries of both.

For a number of years, this controversy was resolved by written agreements between the city and the district. However, at trial, the city sought to terminate the current contract, and the court ordered that it could do so provided reasonable notice was given. That portion of the trial court's order has not been appealed.

As a further matter, the city and the district each sought the exclusive right to provide water service to the overlap areas. The trial court determined that under federal statutes the district had that right. It is this determination that the city appeals.

The district cross-appeals the trial court's determination that it is not a municipality governed by the provisions of § 31-35-402(1), C.R.S. (1986 Repl. Vol. 125), and, thus, would require the consent of the city to provide service at some future time.

I.

The city contends that the trial court erred in its conclusion that the district has the exclusive right to provide water service in the overlap areas for a certain length of time. We do not agree.

During its existence, several financial transactions were made by the district to establish and improve its water system. Pertinent to the action before us are bond transactions which occurred in 1981, 1983, and 1988.

In 1981, the district issued revenue bonds which were bought by the federal Farmers Home Administration (FmHA). As security for the bond issue, the district pledged its revenues.

In 1983, in a transaction known as "advance refunding," the district refinanced the 1981 bonds by issuing a new series of bonds. The proceeds from the 1983 refunding bonds were placed into an escrow account and from there were used to pay the principal and interest on the 1981 bonds as such amounts came due. The escrowed bond proceeds replaced the district revenues as security for the 1981 bonds, and those revenues became the security for the 1983 refunding bond issue.

In 1988, pursuant to the Omnibus Budget Reconciliation Act of 1986, 7 U.S.C. 1929a note (1988), (OBRA) and the Continuing Appropriations Act of 1987, the district purchased its 1981 bond issue from FmHA. In so doing, the district's indebtedness to FmHA was cancelled, and the paying agent for the escrowed funds was directed by FmHA to make all future payments on the 1981 bond directly to the district.

At issue here is the effect of Section 306(b) of the Consolidated Farm and Rural Development Act, 7 U.S.C.

§ 1926(b) (1988), on those transactions. That section states:

> The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar services within such area *during the term of such loan*; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event. (emphasis added)

Under the statute an "association" is defined as an "entity which has received a loan from the Secretary (FmHA)" *Pinehurst Enterprises, Inc. v. Town of Southern Pines*, 690 F. Supp. 444, 452 (M.D.N.C. 1988). The city does not dispute that the district is such an entity. However, it is the position of the city that the district has by its financial transactions removed itself from the protection afforded by 7 U.S.C. § 1926(b).

A.

First, the city maintains that the district, in advance refunding its 1981 bond issue, redeemed the bond and thus removed itself as debtor when the escrowed funds became the source and security for repayment. In support of this argument, it cites *Glenpool Utility Services Authority v. Creek County Rural Water District No. 2*, 861 F.2d 1211, (10th Cir. 1988), *cert. denied*, 490 U.S. 1067, 109 S.Ct 2068, 104 L.Ed.2d 632 (1989) (to meet the threshold requirements of 7 U.S.C. § 1926(b), there must be a continuing indebtedness under Section 1926); *Water Works District No. II v. City of Hammond*, No. CIV.A.86-0187, 1989

Westlaw 117849, (E.D. La. 1989) (Section 1926(b) applies only while the water association is indebted to FmHA).

The district, on the other hand, argues that the bond was not redeemed but merely "defeased" and, therefore, that the term of the note continues and is still outstanding. It finds support for this position in *City of Virginia v. Northland Office Properties Limited Partnership*, 465 N.W.2d 424 (Minn. App. 1991) (a bond which has been advance refunded is still outstanding) and in the uncontradicted testimony of its expert in municipal finances that the defeasance did not discharge the underlying obligation. We agree with the district.

According to its legislative history, the purpose of 7 U.S.C. § 1926(b) is:

> to assist in protecting the territory served by such an association against competitive facilities, which might otherwise be developed with the expansion of municipal and other public bodies into an area served by the rural system.

*Jennings Water, Inc. v. City of North Vernon*, 895 F.2d 311, 315 (7th Cir. 1989). Furthermore, it was the intent of Congress "to encourage rural water development" and "to safeguard the viability and financial security of such associations (and FmHA's loans)." *City of Madison v. Bear Creek Water Ass'n, Inc.*, 816 F.2d 1057, 1060 (5th Cir. 1987).

The intent of Congress, therefore, was not limited to protection of FmHA but extended to protect the entity which had incurred debt to develop rural water service. This interpretation is in accord with the conclusion of *Jennings Water, Inc. v. City of North Vernon*, 682 F. Supp. 421 (S.D. Ind. 1988), *aff'd*, 895 F.2d 311 (7th Cir. 1989), that Congress intended 7 U.S.C. § 1926(b) to be read broadly.

Here, although the original lien on the district revenues brought about by the 1981 bond issue was discharged, those revenues were at the same time encumbered by the refunding issue of 1983. The district's indebtedness thus remains, even though the source of repayments for the 1981 bonds has shifted to the escrowed funds. Furthermore, should the escrowed funds be insufficient, the shortfall would be made up from district revenues, which are also the basis of payment for the 1983 bonds.

Our supreme court, in *Columbia Savings v. Zelincer*, 794 P.2d 231 (Colo. 1990), held that a cancellation or renunciation of an instrument made unintentionally or by mistake has no effect. An intent to discharge a party must be present, and the determination of the intent of the parties involves a question of fact.

Under the circumstances here, we cannot conclude that the 1983 bond issue satisfied the district's debt to FmHA. The district structured its transactions with the intent to preserve the indebtedness to FmHA, and its expert so testified in detail and without contradiction. Hence, we agree with the trial court's conclusion that the 1983 transaction did not serve to relieve the district of its underlying debt to FmHA and did not remove it from the protection afforded by 7 U.S.C. § 1926(b). *See 2415 Corp. v. Board of Trustees*, 209 Ill. App. 3d 504, 568, N.E.2d 276 (1991) (trial court should not ignore municipal bond expert's opinion as to meaning to be ascribed to terms of art in a specialized area of the law).

B.

The city alternatively argues that the district's indebtedness to FmHA was satisfied when it purchased its 1981 bond from FmHA in 1988 and, consequently, that the district is not entitled to protection under 7 U.S.C. § 1926(b). We are not persuaded.

OBRA and the Continuing Appropriations Act of 1987 required that FmHA sell certain assets. The Agricultural Credit Act of 1987, 7 U.S.C. 1929a at 846 (1988), amended OBRA to require that the Secretary of Agriculture first offer for sale to the issuer any notes or other obligations held under the Consolidated Farm and Rural Development Act.

The district took advantage of this opportunity to purchase its 1981 bond at a substantial discount, and the bond was assigned to the district. At that point, FmHA ceased to own the bond, and the administrator of the escrowed funds was directed by FMEA to make payments of principal and interest to the as such amounts came due.

While it is true that upon the assignment of the bonds to it the district was no longer indebted to the federal government, we conclude, for the reasons stated above, that the underlying debt did not cease to exist and that 7 U.S.C. § 1926(b) still applied to safeguard the viability and financial security of the district. *See City of Madison v. Bear Creek Water Ass'n, Inc., supra.*

Moreover, the circumstances presented here is specifically addressed by OBRA, 7 U.S.C. 1929a at 846 (1988):

> (g) Applicability of Prohibition on Curtailment or Limitation of Service. Section 306(b) of the Consolidated Farm and Rural Development Act (7 U.S.C. 1926(b)) *shall be applicable to all notes or other obligations sold or intended to be sold under this section.* (emphasis added)

The city maintains that when Congress directed that the protection of 7 U.S.C. § 1926(b) should be applicable to all obligations thus sold, it intended to safeguard a third party's entitlement to payment and not to extend protection to debtors who had purchased their own notes at a discount. However, the city cites no authority in support of this

argument, and we prefer to rely upon the plain language of the status which references *all* notes and obligations.

Additionally, we conclude that this provision, when read in conjunction with the provision that such notes or obligations be offered first to the issuer, clearly indicates the intent of Congress that the protection of 7 U.S.C. § 1926(b) apply as long as the underlying obligation evidenced by the note exists.

Accordingly, we agree with the trial court's conclusion that 7 U.S.C. § 1926(b) prohibits the city from providing water service to the overlap areas so long as the district's 1981 water revenue bond remains outstanding.

C.

The city, relying upon 7 U.S.C. § 1929a(e)(1988), argues that the district's liability has been discharged. Again, we are not persuaded.

The pertinent language provides:

> The Secretary and any subsequent purchaser of such notes or other obligations sold by the secretary on a nonrecourse basis shall be relieved of any responsibilities that might have been imposed had the borrower remained indebted to the Secretary.

While the statute relieves the obligations of the Secretary and the subsequent purchaser, it does not so absolve the borrower. Here, the district is both purchaser and borrower. And, because we conclude that it is the district's position as borrower that is at issue here, the statute is inapposite.

D.

The city contends that the trial court erred by its refusal to address as untimely the city's argument, raised in a post-trial motion, that the application of 7 U.S.C. § 1926(b) is in

violation of the Tenth Amendment which reserves powers not delegated to the United States, or prohibited by the Constitution, to the States or the people. Assuming, arguendo, that the argument was timely raised, we conclude that the statute's conflict with the Tenth Amendment previously has been addressed in *City of Madison v. Bear Creek Water Ass'n, Inc., supra.*

There, the court concluded that because the application of § 1926(b) was restricted in time and scope so as not to disable the city severely from performing its function, it did not violate the Tenth Amendment. The city maintains that the *Madison* analysis is premised upon the existence of an outstanding federal debt and, thus, is not applicable here. We do not agree.

The *Madison* court determined that § 1926(b) did not permanently curtail the city's authority because it applies only while the federal debt is outstanding. Nevertheless, our interpretation of the court's ruling is that it turns upon the scope of the curtailment of authority rather than upon the existence of federal indebtedness. Consequently, under the facts here, in which the city is limited only in its provision of water services to a defined area and that limitation is of a temporary nature, we conclude that there is no offense to the Tenth Amendment.

E.

Because we have determined that the trial court correctly based its decision upon the applicable federal statutes, we do not address the contentions of the city which rest upon provisions of the Uniform Commercial Code as adopted by our General Assembly.

II.

The district, on cross-appeal, contends that the trial court erred in its conclusion that the district is not a municipality for the purposes of § 31-35-402(1) and, consequently, that the city has exclusive rights to provide water service to the overlap areas when the district's 1981 debt is repaid.

Because almost three decades may elapse before the protection afforded by 7 U.S.C. § 1926(b) is lost to the district, we conclude that the decision of the trial court to address this issue was premature.

Furthermore, the issue of who has the right to provide water service to the overlap areas when the district's 1981 debt is repaid presents no justiciable controversy at this time. Therefore, we vacate that portion of the trial court's judgment.

III.

Finally, the city contends that the trial court erred in its general award of costs to the district. Here, no specific award of costs were made, and the trial court retained jurisdiction pending the outcome of a relevant case currently before the supreme court, *Board of County Commissioners v. Crystal Creek Homeowners Ass'n* (Colo. No. 925A312, pending as of Oct. 1, 1993). Thus, the city's appeal of this issue is untimely, and we dismiss it without prejudice.

The judgment is affirmed in part, vacated in part, and the appeal is dismissed as to the award of costs.

JUDGE TURSI and JUDGE TAUBMAN concur.

OPINION is modified as follows:

Beginning on page 5, 26 lines from the top of the page, the following deletions (shown by overstriking) and additions (shown by redlining) are made:

1983 bond issue satisfied the district's debt to FmHA. The district~~, at all times,~~ structured ~~the~~ its transactions with the

And, on page 9, 10 lines from the top of the page, the following deletions (shown by overstriking) and additions (shown by redlining) are made:

The *Madison* court determined that § 1926(b) "did not permanently curtail the city's authority because it applies only while the federal debt is outstanding." Nevertheless, our interpretation

## CERTIFICATE OF SERVICE

I hereby certify that the foregoing Joint Appendix Vol. I through V were sent via U.S. Mail to the parties listed below on the 23rd. day of February, 1996.

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Honorable Sandra S. Beckwith
Judge of the United States District Court
Southern District, Western Division
Potter Stewart United States District Courthouse
100 East 5th Street, Room 810
Cincinnati, Ohio 45202

/s/ LOUIS T. ROSENBERG

Louis T. Rosenberg
John W. Hust

CITY OF MADISON, MISSISSIPPI,
*Plaintiff-Appellant,*

v.

BEAR CREEK WATER ASSOCIATION, INC.,
*Defendant-Appellees,*

United States of America,
through its agency,
Farmers Home Administration,
*Intervenor-Appellee.*

No. 86-4552.

United States Court of Appeals,
Fifth Circuit.

May 15, 1987.

City instituted eminent domain proceedings to condemn facilities of water association indebted to Farmers Home Administration. Administration intervened, and action was removed. The United States District Court for the Southern District of Mississippi, Henry T. Wingate, J., entered summary judgment in favor of water association and Administration, and city appealed. The Court of Appeals, Edith H. Jones, Circuit Judge, held that: (1) city was precluded from condemning water association's facilities located within city limits and certificate of public convenience and necessity during term of water association's indebtedness to Administration, and (2) section of Consolidated Farm and Rural Development Act, proscribing cities from curtailing or limiting services provided by water association indebted to Administration, did not violate the Tenth Amendment.

Affirmed.

1. Federal Courts — 766

Summary judgments are reviewed by Court of Appeals in same manner as federal district court, i.e., in terms of whether there is any genuine issue of material fact, and whether appellee was entitled to judgment as a matter of law.

2. States — 18.69

City was precluded from condemning water association's facilities located within city limits and association's certificate of public convenience and necessity during term of association's indebtedness to Farmers Home Administration. Consolidated Farm and Rural Development Act, § 306(b), 7 U.S.C.A. § 1926(b).

3. Waters and Water Courses — 202

Under Consolidated Farm and Rural Development Act, local government may not encroach upon services provided by water association indebted to Farmers Home Administration, be that encroachment in form of competing franchises, new or additional permit requirements, or similar means, such as condemnation of association's facilities or certificate of public convenience and necessity. Consolidated Farm and Rural Development Act, § 306(b), 7 U.S.C.A. § 1926(b).

4. Statutes — 217.4

Legislative history need not be examined where statutory language is unambiguous and yields no absurd results.

5. Waters and Water Courses — 202

Section of Consolidated Farm and Rural Development Act, prohibiting cities from curtailing services of water associations indebted to Farmers Home Administration by granting competing franchises or annexing areas served by

association, serves two congressional purposes: to encourage rural water development by expanding number of potential users of such systems, thereby decreasing per-user cost, and to safeguard viability and financial security of such associations and loans by Farmers Home Administration to such associations by protecting those associations from expansion of nearby cities and towns. Consolidated Farm and Rural Development Act, § 306(b), 7 U.S.C.A. § 1926(b).

6. States — 4.17

Section of Consolidated Farm and Rural Development Act, proscribing cities from curtailing or limiting services provided by water association indebted to Farmers Home Administration by granting competing franchises or by annexing areas served by association, did not violate Tenth Amendment; statute curtailed city's authority in regard to provision of water service only while association was indebted to Administration and was enacted to protect Administration's subsidy of rural water authorities. Consolidated Farm and Rural Development Act, § 306(b), 7 U.S.C.A. § 1926(b); U.S.C.A. Const.Amend. 10.

7. States — 4.16

Tenth Amendment is not offended by limited restriction imposed by federal government to protect its subsidized loans, particularly when benefits of those loans accrue to municipality. U.S.C.A Const. Amend. 10.

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James P. Coleman, Ackerman, Miss., for amicus curiae Miss. Rural Water Assoc.

Louis T. Rosenberg, San Antonio, Tex., for amicus curiae Green Valley Water Supply Corp. and Texas Rural Water Supply Assoc.

Appeal from the United States District Court For the Southern District of Mississippi.

Before THORNBERRY, GEE, and JONES, Circuit Judges.

EDITH H. JONES, Circuit Judge:

The City of Madison, Mississippi ("Madison"), appeals from the district court's grant of summary judgment in favor of Bear Creek Water Association, Inc. ("Bear Creek"), and the Farmers Home Administration ("FmHA"). Because we agree with the district court that 7 U.S.C. § 1926(b) precludes municipal condemnation of a water association's facilities during the term of its indebtedness to the FmHA, we affirm.

## I. BACKGROUND

In the early 1970's, Bear Creek, a non-profit corporation, was organized to seek a certificate of public convenience and necessity from the Mississippi Public Utility Commission to operate a rural water utility. As the proposed certificated area was within one mile of the city limits of Madison, the city's acquiescence was necessary before the certificate could be issued. In 1971, the city agreed to relinquish its rights in the area, and Bear Creek received the certificate of public convenience. Since this time, Bear Creek has in-

stalled and operated the water system in the certificated area, financed by five loans from FmHA.[1]

However, during this time the City of Madison has grown substantially, and its boundaries now include a part of the area served by Bear Creek. In 1985, the city instituted eminent domain proceedings to condemn Bear Creek's facilities located within city limits as well as Bear Creek's certificate to operate in that area. This area includes approximately 40% of Bear Creek's customers, and 60% of Bear Creek's water supply facilities, including its water plant, wells, and feeder mains. FmHA subsequently intervened and the case was removed to federal court pursuant to 28 U.S.C. §§ 1444 and 2410.

In July 1986, the district court granted Bear Creek's motion for summary judgment on the ground that because Bear Creek was indebted to FmHA, 7 U.S.C. § 1926(b) applied and precluded the city's condemnation action. The city now appeals.

## II. DISCUSSION

[1] We review summary judgments in the same manner as the district court, in terms of whether there is any genuine issue of material fact and whether appellee was entitled to judgment as a matter of law. *McCrea v. Hankins*, 720 F.2d 863 (5th Cir.1983).

### A. 7 U.S.C. § 1926(b)

Regarding water associations indebted to FmHA, 7 U.S.C. § 1926(b) provides:

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[1] Bear Creek's current indebtedness to FmHA is approximately $1.4 million, and Bear Creek has recently qualified for an additional $1 million in FmHA loans for system expansion and improvements.

> The service provided or made available through any such association shall not be curtailed or limited by the inclusion of the area within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of said loan; nor shall the happening of such event be the basis of requiring such association to secure any franchise, license or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

The district court held that this provision prohibits cities such as Madison from curtailing the services of funded water associations, be it through annexation, franchise, or condemnation. Madison argues that because the statute does not expressly prohibit condemnation, § 1926(b) only protects such associations from competition from municipalities, and thus does not preclude such entities from exercising their right of eminent domain.

[2, 3] We disagree. The statute unambiguously prohibits any curtailment or limitation of an FmHA-indebted water association's services resulting from municipal annexation or inclusion. This language indicates a congressional mandate that local governments not encroach upon the services provided by such associations, be that encroachment in the form of competing franchises, new or additional permit requirements, or similar means. To read a loophole into this absolute prohibition, as Madison would have us do, and allow a city to do via condemnation what is forbidden by other means, would render nugatory the clear purpose of § 1926(b). See *Moore Bayou Water Association, Inc. v. Town of Jonestown*, 628 F.Supp. 1367 (N.D.Miss. 1986) (holding municipal condemnation of water association's facilities and certificate violative of § 1926(b)).

Madison contends that this construction of the statute is untenable because it leads to the "plainly absurd" result that

FmHA-financed water authority could avoid condemnation even if it owed only $1.00 on its government loan. However, it was Congress, and not this Court, that literally proscribed interference by competing facilities with the rural water authority "during the term of said loan." The city's logic also assumes § 1926(b) must somehow be construed to effectuate the local condemnation power. Pursuing such logic, we might decide that so long as the condemnation does not "unduly interfere" with the water authority's payment obligations to FmHA, or with its ability to service rural water users, the condemnation may proceed. Such a result, however, would have a perverse impact upon both the rural water authority and the would-be condemnor. In each case, the contending parties could raise and seek adjudication of the fact issue concerning the extent of interference that would result from condemnation. A condemnation case impinging on a rural water authority could easily involve both state and federal court litigation, high legal fees and considerable delay, to the ultimate detriment of the municipality, the rural water authority, and the consumers of water service. A bright-line rule which prohibits condemnation throughout the FmHA loan term at least creates certainty for the municipal planner and the rural water authority, even if it limits the municipality's options.

[4, 5] Madison, however, argues that our interpretation of § 1926(b) is contrary to the legislative history of that provision. While we need not resort to legislative history where, as here, the statutory language is unambiguous and yields no absurd results, see *Steere Tank Lines, Inc. v. I.C.C.*, 724 F.2d 472, 477 (5th Cir.1984), we note that our interpretation of § 1926(b) comports with the purposes found in its legislative history:

> By interpretation, loans cannot now be made unless a major part of the use of the facility is to be by farmers. This section would broaden the utility of this authority

> somewhat by authorizing loans to associations serving farmers, ranchers, farm tenants, and other rural residents. This provision authorizes the very effective program of financing the installation and development of domestic water supplies and pipelines serving farmers and others in rural communities. By including service to other rural residents, the cost per user is decreased and the loans are more secure in addition to the community benefits of a safe and adequate supply of running household water. A new provision has been added to assist in protecting the territory served by such an association against competitive facilities, which might otherwise be developed with the expansion of municipal and other public bodies into an area served by the rural system.

S.Rep. No. 566, 87th Cong., 1st Sess., *reprinted in* 1961 U.S.Code Cong. & Admin. News 2243, 2809. This history indicates two congressional purposes behind § 1926: 1) to encourage rural water development by expanding the number of potential users of such systems, thereby decreasing the per-user cost, and 2) to safeguard the viability and financial security of such associations (and FmHA's loans) by protecting them from the expansion of nearby cities and towns.

The case at bar exemplifies the evil Congress wished to avoid. Bear Creek's affidavits showed that Madison desires to condemn 60% of its facilities and 40% of its customers, including the most densely populated (and thus most profitable) territory now served by Bear Creek. Even if fair value is paid for the lost facilities, such an action would inevitably have an adverse effect on the remaining customers of Bear Creek, in the form of lost economies of scale and resulting higher per-user costs. To allow expanding municipalities to "skim the cream" by annexing and condemning those parts of a water association with the highest population density (and thus the lowest per-user cost) would undermine Con-

gress's purpose of facilitating inexpensive water supplies for farmers and other rural residents and protecting those associations' ability to repay their FmHA debts. See *Public Utility District No. 1 of Franklin County v. Big Bend Electrical Cooperative, Inc.*, 618 F.2d 601 (9th Cir.1980) (similarly rejecting utility's attempt to condemn property owned by cooperative financed by the Rural Electrical Administration).

Our interpretation of § 1926(b) is also inferentially supported by FmHA regulations regarding the transfer of water facilities subject to FmHA liens. These regulations require that any transfer must be approved by FmHA to insure that services will not be curtailed and that repayment of the FmHA loans is not jeopardized. 7 C.F.R. 1951.209, 1951.214 (1986).[2] The regulations also suggest an alternate means by which the city might acquire the facilities it desires, in the context of a consensual sale.

B. Tenth Amendment

[6] the city urges that if § 1926(b) limits the city's sovereign condemnation power, it violates the Tenth Amendment to the Constitution. We are not unsympathetic to enforcing the legitimate Tenth Amendment-based claims of state authorities against federal government infringement. Our natural ardor to preserve that critical division of power between the federal and state governments, a bulwark of protecting our individual liberties, is necessarily dampened, however, by the supreme Court's decision in *Garcia v. San*

[2]Appellants' reliance on the unreported case of *View-Caps Water Supply Corp. v. City of Abilene*, No. CA-1-83-119-W (N.D.Tex.1985) is misplaced. In that case, where the district court allowed the City of Abilene to serve customers in an area originally certified to the water association, FmHA had apparently approved a contract between the parties which provided for the city's acquisition of the water facilities in the event of annexation. In the case at bar, there is no such contract and there has been no FmHA approval.

*Antonio Metropolitan Transit Authority,* 469 U.S. 528, 105 S.Ct. 1005, 88 L.Ed.2d 1016 (1985). Inasmuch as *Garcia* upheld the application of the Fair Labor Standards Act against a city entity as a valid execution of congressional power under the commerce clause, it may or may not be directly controlling in this case. The City of Madison would not prevail even under a broader vision of the Tenth Amendment than the Court propounded in *Garcia*, however, for we perceive no significant limitation on the city's powers by virtue of a statute enacted to protect FmHA's subsidy of rural water authorities. FmHA's characterization of § 1926(b) as resting on Congress's undoubtedly broad powers under the spending clause seems more appropriate to this case than any commerce clause-based argument. Constitution Art. I Section 8, clause 1. See *Helvering v. Davis*, 301 U.S. 619, 645, 57 S.Ct. 904, 910, 81 L.Ed. 1307 (1936) ("When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states. So the concept be not arbitrary, the locality must yield.")

The issue is not, as the city would have it, whether under the Tenth Amendment its condemnation power is integral to its sovereignty, but rather whether the provision of water service is essential to its sovereignty. Let us assume that it is. *See Brush v. Commissioner*, 300 U.S. 352, 370-73, 57 S.Ct. 495, 500-02, 81 L.Ed. 691 (1937). Section 1926(b) limits the city's provision of such service not only by condemnation but also by preventing the city from granting a competing franchise, building its own competitive facility or otherwise curtailing the service of the federally funded rural water authority. Section 1926(b) does not, however, permanently curtail the city's authority, because it applies only while the federal debt is outstanding. Additionally, the city may and does regulate growth within that part of Madison served by Bear Creek so as to assure minimum standards of water service such as adequate fire hydrants.

The city can and has in the past collaborated with Bear Creek to collect municipal bills for sewer service. It may also, pursuant to FmHA regulations, agree to purchase facilities from Bear Creek. The limits on the provision of water service are thus restricted in time and in scope so as not to disable the city severely from performing its governmental function. At most, Section 1926(b) ordains a dual water authority function within a municipal area for a period of time.

[7] Equally important, it is likely that FmHA's subsidy to the rural water authority enhanced real estate values and farm prosperity in and around the city and has provided an indirect benefit to the city's overall economic conditions in exchange for the limits on its water service authority. The overall effect of this statute is therefore not so much to infringe the city's sovereign power as to foster a cooperative effort between local and federal authorities. The Tenth Amendment is surely not offended by a limited restriction imposed by the federal government to protect its subsidized loans, particularly when the benefits of those loam accrue to the municipality.

## III. CONCLUSION

Because § 1926(b) forbids, as a matter of law, municipal condemnation of an FmHA indebted water association's assets, there was no genuine issue of material fact before the district court. Summary judgment was therefore correctly granted.

AFFIRMED.

Applicability of Prohibition on Curtailment or Limitation of Service

Section 1001(g) of Pub.L. 99-509, as added Pub.L. 100-233, Title VIII, § 803, Jan. 6, 1988, 101 Stat. 1714, provided that: "Section 306(b) of the Consolidated Farm and Rural Development Act (7 U.S.C. 1926(b)) shall be applicable to all notes or other obligations sold or intended to be sold under this section [Pub.L. 99-509, § 1001, amending this section and enacting provisions set out as notes under this section]."

Sale of Rural Development Notes and Other Obligations

Section 1001 of Pub.L. 99-509, as amended Pub.L. 100-233, Title VIII, § 803, Jan. 6, 1988, 101 Stat. 1714, provided that:

"(a) Sales required. — The Secretary of Agriculture, under such terms as the Secretary may prescribe, shall sell notes and other obligations held in the Rural Development Insurance Fund established under section 309A of the Consolidated Farm and Rural Development Act (this section] in such amounts as to realize net proceeds to the Government of not less than —

"(1) $1,000,000,000 from such sales during fiscal year 1987.

"(2) $552,000,000 from such sales during fiscal year 1988, and

"(3) $547,000,000 from such sales during fiscal year 1989.

"(b) [Amended subsec. (e) of this section]

"(c) Contract provisions. — Consistent with section 309A(e) of the Consolidated Farm and Rural Development Act [subsec. (e) of this section], as amended by subsection (b), any sale of notes or other obligations, as

described in subsection (a), shall not alter the terms specified in the note or other obligation, except that, on sale, a note or other obligation shall not be subject to the provisions of section 333(c) of the Consolidated Farm and Rural Development Act [section 1983(c) of this title].

"(d) Eligibility to purchase notes. — Notwithstanding any other provision of law, each institution of the Farm Credit System shall be eligible to purchase notes and other obligations held in the Rural Development Insurance Fund and to service (including the extension of additional credit and all other actions necessary to preserve, conserve, or protect the institution's interest in the purchased notes or other obligations), collect, and dispose of such notes and other obligations, subject only to such terms and conditions as may be agreed to by the Secretary of Agriculture and the purchasing institution and as may be approved by the Farm Credit Administration.

"(e) Loan servicing. — Prior to selling any note or other obligation, as described in subsection (a), the Secretary of Agriculture shall require persons offering to purchase the note or other obligation to demonstrate —

"(1) an ability or resources to provide such servicing, with respect to the loans represented by the note or other obligation, that the Secretary deems necessary to ensure the continued performance on the loan; and

"(2) the ability to generate capital to provide the borrowers of the loans such additional credit as may be necessary in proper servicing of the loans."

"(f)(1) In general. — Before conducting a sale of a portfolio of notes or other obligations under this section [Pub.L. 99-509, § 1001, amending this section and enacting provisions set out as notes under this section], the Secretary of Agriculture shall —

"(A) determine whether the issuer of any unsold note or other obligation desires to purchase the note or other obligation; and

"(B) if so, hold open for 30 days, an offer to sell the note or other obligation to the issuer at a price to be determined under paragraph (2).

"(2) Determination of offering price. —

"(A) Authority. — The Secretary of Agriculture shall determine, in accordance with subparagraph (B), the price at which a note or other obligation shall be offered for sale under this subsection.

"(B) Price. —Such price shall be determined by discounting the payment stream of such note or other obligation at the yield on the then most recent sale of the portfolio, adjusted for changes in market interest rates, servicing and sales expenses, and the maturity and interest rate of such note.

"(3) Prohibitions. —

"(A) Purchase of obligation not tied to purchase of other obligations. — The Secretary of Agriculture shall not require the issuer of any unsold note or other obligation to be offered for sale under this subsection to purchase any other such note or other obligation as a condition of the sale of any such note or other obligation to the issuer.

"(B) Offer to be made without regard to financing. — The Secretary shall offer notes or other obligations for sale to the issuers thereof under this subsection without regard to the manner in which such issuers intend to finance the purchase of such notes or other obligations. However, the price of sale to any issuer using tax exempt financing shall be determined using a yield reflective of the Schedule of Certified Interest Rates as published monthly by the Secretary of the Treasury.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

SCIOTO COUNTY REGIONAL WATER DISTRICT NO. 1, AUTHORITY

*Plaintiff*

vs.

SCIOTO WATER, INC.,

*Defendant*

and

RICHARD ROMINGER, Acting Secretary, U.S. Department of Agriculture, Rural Economic and Community Development Service (formerly Farmers Home Administration)

Defendant.

CASE NO. C-1-95-204

(Rubin, J.)

# FIRST AMENDED COMPLAINT (VERIFIED) FOR TEMPORARY RESTRAINING ORDER; ALTERNATIVELY, PRELIMINARY INJUNCTION, PERMANENT INJUNCTION, AND MANDAMUS ORDER

NOW COMES SCIOTO COUNTY REGIONAL WATER DISTRICT NO. 1 AUTHORITY (hereinafter "Water 1"), Plaintiff, by and through counsel, and files this Complaint for Temporary Restraining Order; Alternatively, Preliminary Injunction, Permanent Injunction, and Mandamus Order, and shows this Honorable Court as follows:

## I. PRELIMINARY STATEMENT

1. Water 1, Plaintiff, brings this action complaining of Scioto Water, Inc. ("SWI"). This action is based on violation of 7 U.S.C. § 1926(b), as amended by the Agriculture Credit Act of 1987, P.L. 100-233 § 803(g)[1] which extended the protection of §1926(b) to utilities, such as Water 1, which have obtained the benefits of debt retirement offered pursuant to the Omnibus Budget Reconciliation Act of 1986, P.L. 99-509 § 1001.

2. Supplemental state law claims based on unreasonable groundwater use and violation of UCC Contract provisions are included.

## II. JURISDICTION

1. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 based on federal question claims raised under 7 U.S.C. § 1926(b). Jurisdiction is conferred on this Court pursuant to the Intergovernmental Cooperation Act, 31 U.S.C. § 6501, *et seq.* alternatively, the Administrative Procedure Act, 5 U.S.C. § 551.

2. This Court also has jurisdiction pursuant to the Federal Declaratory Judgement Act, 28 U.S.C., § 2201 and § 2202, and the Mandamus and Venue Act, 28 U.S.C. § 1361.

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[1]Section 1001 of the Omnibus Budget Reconciliation Act of 1986 (7 U.S.C. 1929a note) is amended by adding at the end thereof the following new subsections: ... (g) APPLICABILITY OF PROHIBITION ON CURTAILMENT OR LIMITATION OF SERVICE. — Section 306(b) of the Consolidated Farm and Rural Development Act (7 U.S.C. 1926(b)) *shall be applicable to all notes or other obligations sold or intended to be sold under this section.* (emphasis added)

## III. VENUE

1. Venue is appropriate in this district pursuant to 28 U.S.C. § 1391 (a).

2. During all relevant times this is the judicial district in which Plaintiff and Defendant, Scioto Water, Inc. (hereinafter "SWI") were located, where the claim arose and where the parties transacted business.

## IV. PARTIES

1. Plaintiff Water 1 is a State of Ohio political subdivision, being a regional water district created under the laws of State of Ohio pursuant to Chapter 61, Section 6119 of the Ohio Revised Code. Plaintiff operates under Chapter 61 and is regulated by the Ohio Environmental Protection Agency ("OEPA"). Plaintiff's principal place of business is located at 326 Robert Lucas Road, Lucasville, Scioto County, Ohio 45648.

2. Defendant Scioto Water, Inc. is a private, non-profit water supply corporation on which service of process may be had by serving its President, Donald Spradlin at 1664 State Route 522, Wheelersburg, Scioto County, Ohio, 45694.

3. Defendant Richard Rominger is Acting Secretary of the Department of Agriculture, involved, in this instance, through the Rural Economic and Community Development Service (formerly Farmers Home Administration ("FmHA")), an agency of the U.S. Department of Agriculture. The Department may be served with process by serving its (Acting) Secretary, Richard Rominger, The Administration Building, Room 200A, 14th Street and Independence Avenue, S.W., Washington, D.C. 20250.

## V. FACTS

1. Water 1, a Public District, is a wholesale and retail public water purveyor organized pursuant to petition and order of the Court of Common Pleas of Scioto County, Ohio. This Public District was organized at the request of five (5) townships,[2] and became effective upon court order on or about November 28, 1966, pursuant to its Plan of Operation. By resolutions dated September 1, 1967 and January 8, 1968, respectively, Vernon and Bloom Townships became part of the District. Upon information and belief, Porter Township also requested to and became a member of the District although the Township presently cannot locate a copy of its resolution. Further, the defendant FmHA in its financing documents related to the various loans and transactions involving Water 1 acknowledges that these townships are part of the District. Water 1 has continuously provided service or made service available within the eight (8) township area of eastern Scioto County pursuant to the non-impairment provisions of 7 U.S.C. § 1926(b).

2. In 1967, Water 1 issued and sold to the FmHA $2,272,000.00 of water system revenue bonds, dated May 17, 1967, authorized by Ordinance February 16, 1967, as amended March 2, 1967 ("Initial Series"). Subsequent water system revenue bonds for $649,000.00 were issued July 31, 1969 ("Second Series") and purchased. These Second Series Bonds purchased by FmHA were used for the specific purpose of extending Water 1's distribution line to the Vernon, Bloom and Porter townships per their resolution requests. Bonds for $75,000.00 were issued by Water 1 on November 29, 1973 ("Third Series") and purchased by FmHA. These FmHA purchased bonds were secured by all system revenues derived from Water 1's Plan of Operation in the eight townships pursuant to 7 U.S.C. § 1926 which

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[2] Harrison, Madison, Valley, Jefferson, Clay

provided authority to finance, construct, and operate an affordable cost water utility in rural northeast Scioto County, Ohio, as authorized by the 1962 amendments to the Agriculture Act. 7 U.S.C. § 1926(b) protected the area, system, revenues and rate payers (present and future) from any act of impairment.

3. In 1972 SWI sought permission of Water 1 to become Water 1's permittee to extend Water 1's transmission lines to areas in which Water 1 was obligated to provide service or made service available. Permission to create Water 1's new funding guarantee was deemed necessary due to a funding cap imposed by FmHA.[3] SWI's limited purpose is set forth in Exhibit "A." But for the arbitrary funding limitation of the FmHA, SWI would not exist.

4. On May 1, 1975, Water 1 issued water revenue refunding bonds in the amount of $2,473,000.00, having redeemed, by consent of FmHA, the initial and outstanding resource revenue bonds, pursuant to the Consolidated Farm and Rural Development Act, 7 U.S.C. § 1921, *et seq.* Said bonds were based on projected revenue resulting from a wholesale water supply contract protected pursuant to 7 U.S.C. § 1926(b).

5. On August 20, 1981, Water 1 and SWI executed an agreement which, inter alia, modified the existing wholesale water purchase agreement to reduce SWI's maximum usage from 17,000,000 gallons per month to 10,000,000 gallons per month. The agreement also provided that Water 1 would permit SWI to purchase bulk water from the City of Portsmouth and that Water 1 would purchase from SWI

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[3]Excerpts from Contract dated August 20, 1981: "SWI has as a part of its system certain water mains which are within the territory of Scioto County Regional Water Authority, . . . *said lines were included by SWI due to the limits of financing prevailing and available by FmHA.* . . . (emphasis added).

certain water lines owned by SWI. The agreement further provided that Water 1 would guarantee the cost of water to SWI for a period of five (5) years and further that Water 1 would serve as an emergency backup source of supply to SWI for water SWI is providing in the Wheelersburg, Ohio area. The defendant, FmHA was fully advised of this agreement. This transaction continued the respective roles of Water 1 and SWI. Water 1 was water producer, wholesale supplier and retailer. SWI was bulk water purchaser and retailer.

6. In 1988, Water 1 enacted a surcharge for water usage by SWI over the contracted maximum of 10,000,000 gallons per month. SWI paid and continues to pay the surcharge for purchases in excess of 10,000,000 gallons per month. This transaction continued the respective roles of Water 1 and SWI. Water 1 was water producer, wholesale supplier and retailer. SWI was bulk water purchaser and retailer.

7. The regular purchases of wholesale water from Water 1 by SWI established a course of dealing between Water 1 and SWI which affected their understanding and interpretation of their contractual relationship, and included terms and conditions outside written agreement(s).

8. Water 1 incurred debt in order to finance expansion of improvements in its wellfield and treatment facility. Water 1 undertook this additional debt in reliance upon the protected revenue stream of the water purchase contract between the parties which was to last for a term of 60 years, based on the correspondence, negotiations, and course of dealing established between the parties over the past 22 years.

9. In 1989, Water 1 took advantage of the FmHA debt buyout program directed by Congress pursuant to the Omnibus Budget Reconciliation Act of 1986, P.L. 99-509 § 1001, authorizing sale by FmHA of its notes and bonds. Alternatively, debtors could refinance their own debt and secure a

"discount" on such debt by refinancing. Congress extended non-impairment protection for such transactions in January 6, 1988 pursuant to the Agricultural Credit Act of 1987.

10. Commencing in 1990 - 1991, SWI sought and subsequently obtained approval of a new FmHA loan and grant, the initial disbursement of which was received by SWI in 1994. It additionally sought Ohio Environmental Protection Agency (hereinafter "OEPA") approval of its plan. SWI proposed development of a new wellfield two miles upstream from Water 1's wellfield and to build supporting surface water treatment plant to provide a water source independent of Water 1.

11. During project development, SWI failed to provide direct notice to its contracting party, Water 1, concerning its plans. SWI projected its wellfield, treatment plant and transmission facilities on inaccurate future customer counts. It included customers of Jackson County Water Company, Inc. ("JCWC") in its effort to falsify the project presentation, even after being apprised by JCWC concerning its customers at a hearing in 1991. FmHA, although apprised of SWI's "over-counting" in 1991, failed to consider the deceit of SWI's counting JCWC customers as future SWI customers. FmHA ignored the falsified data supporting the SWI Application for Federal Assistance until JCWC complained in writing in 1995.

12. SWI's project development, requests for FmHA approval and FmHA's approvals have disregarded Plaintiff Water 1's objections. SWI's project will impair Water 1's system based on: a) loss of bulk water sales; b) loss of underground aquifer water flow with adequate time of travel ("TOT") for purposes of filtration; c) loss of volume of water due to wellfield proximity; d) required redesign and reconstruction of Water 1 water treatment plant; e) loss of retail customers that would have otherwise been served through Water 1, but for the preexisting relationship be-

tween permitter Water 1 and permittee SWI. Each damage above will result in lost revenue to Water 1. Each impairment violates the Act and should be precluded by injunction, damages, or equitable relief pursuant to the Act.

13. On or about March 1, 1995 the SWI project received an inspection by OEPA as a prerequisite to issuance to SWI of an operational permit. Once OEPA issues the permit, SWI will be authorized to operate the treatment plant and wellfields already constructed.

14. SWI's conduct in the 1990 - 1995 period, where it sought to develop its stand-alone system, to the detriment and impairment of Water 1, violated the 20 year long standing relationship whereby SWI was the permittee purchasing water wholesale from Water 1 and transporting and selling same to customers to provide and make service available. SWI's development of wellfield facilities, surface water treatment plant and transmission system to connect into an adjoining county and serve the Village of Oak Hill — and serve retail customers that would have otherwise been served by Water 1 — were acts outside the terms of the permit, agreements, and patterns and practices between the parties and were *ultra vires* and void *ab initio* to the approvals and agreements. The conduct causing impairment was without authority and violated both state and federal law, with active support from the FmHA.

## VI. VIOLATION OF 7 U.S.C. § 1926(b)

1. The facts alleged in Section V are included by reference as if fully set forth for all purposes. The conduct of SWI is in violation of 7 U.S.C. § 1926(b). § 1926(b) prohibits curtailment of water service provided or made available. In this case, Plaintiff Water 1 is the protected entity. Curtailment is an " . . . absolute prohibition." *City of Madison, Miss. vs. Bear Creek Water Assn., Inc.*, 816 F.2d 1057, 1059 (5th Cir. 1987). Any acts of SWI to impair

or curtail service provided or made available was *ultra vires* and void *ab initio* under the terms of the parties' agreement as permittor-permittee and violated state and federal law for one or more of the reasons set forth in this Complaint.

2. Congress has extended protection of 7 U.S.C. § 1926(b) to debt made under the 1986 Omnibus Budget Reconciliation Act buy-out program, P.L. 99-509, § 1001, pursuant to the Agricultural Credit Act of 1987, P.L. 100-233 § 803(g). SWI's FmHA funded project will curtail service of Water 1 in its area and impair its ability to repay its indebtedness in violation of 7 U.S.C. § 1926(b) as amended by § 803.

3. FmHA is violating § 1926(b) by providing approvals and financing for the construction of the SWI treatment facilities, thereby impairing Water 1's service and impairing its ability to repay its indebtedness. SWI is violating § 1926(b) by constructing the project to curtail Water 1's service.

4. Water 1 has no adequate remedy at law. Water 1 has exhausted all administrative relief. Should FmHA be allowed to continue funding the project as presently anticipated, Plaintiff Water 1 will suffer irreparable injury. There is an immediate threat of harm because SWI will, having received its operational inspection from OEPA, begin plant operation once the operational permit is issued.

5. Water 1 seeks an Order of this Honorable Court pursuant to the Mandamus and Venue Act and the Federal Injunction Act to require the FmHA to maintain the status quo and cease distribution of any funds obligated to the SWI project, to convey the facilities to Water 1, and to discount the loans made by FmHA to SWI.

6. FmHA has a legal duty not to curtail service by Water 1. Section 1926(b) prohibits such curtailment. Said duty is plainly prescribed. As funding agency charged with

enforcement of the statute that precludes impairment, FmHA is required to obey its own non-impairment Act involved with funding, as well as rules promulgated in aid of the Act and under the Administrative Procedures Act.

7. For the irreparable harm and damage done to Water 1, and for the harm and damage that will continue but for the intervention of this Court, Water 1 has no adequate remedy at law. Such damages are to a large degree incalculable. Water 1 seeks a temporary restraining order to immediately enjoin SWI from receiving (and FmHA from making any further disbursements or approvals) and utilizing any additional funds from FmHA and operation of the facility. Water 1 seeks a preliminary or temporary injunction enjoining SWI from taking any further steps in connection with the funding, approval, permitting, and operation of the project, Phase I, Phase II, Phase III or any additional phases thereto. Water 1 seeks to maintain the status quo of the project until a hearing on preliminary injunction, or a trial on the merits can be had.

8. Water 1 seeks a permanent injunction upon trial of this case, enjoining SWI from receiving any funds from any source to complete the project, pursuing any approvals from the OEPA or ODNR for operation of the Project, actually operating the facilities and from developing or acquiring, directly or indirectly, any other source of water, either independently or from any other water supplier, that would impair Water 1.

9. This injunctive relief will not cause substantial harm to Defendants since the project is not complete and is not currently receiving customer-based revenue. Moreover, the public interest is maintaining affordable water rates and avoidance of default on debt incurred for the benefit of SWI requiring that injunctive relief be granted.

## VIII. VIOLATION OF ICA

1. The facts alleged in Sections V through VI are included herein by reference as if fully set forth for all purposes. The failure of SWI to provide notice to, conduct consultation with Water 1 (as well as accurately consult with State and Federal agencies) is in violation of the Intergovernmental Cooperation Act, 31 U.S.C. § 6501, *et seq.* ICA requires notice, an opportunity for hearing and testimony, consultation to avoid duplication or redundant expenditure of federal funds, and a record in support of agency action.

2. Moreover, the Act does not anticipate new federal expenditures will be used to injure and damage a political subdivision through expenditure by a private grantee. As a protected party, Water 1 seeks injunctive relief previously set forth herein to require SWI and FmHA to comply with the statute in connection with pursuit of any funds request. By separate correspondence from James Cogan, RECDS Columbus, Ohio office and James Schwartz, Acting Director of Water and Wastewater, RECDS Washington, D.C. Office, both dated February 28, 1995, the agency admits that Phase III of the SWI project has not been properly reviewed by the state and regional clearinghouse pursuant to Executive Order 12372 and the ICA.[4]

---

[4]The Defendant FmHA admits that: We understand that funding has been approved for a treatment plant and a second phase that will provide service to the Village of Oak Hill. The Oak Hill project has not yet been bid, but the funding has been approved. We also understand that original approval by the state clearinghouse covered another phase that will extend service to various places in Scioto and Jackson County. Funds for this project have not been obligated; therefore, we agree that a new clearinghouse review would be needed if Scioto Water Inc. wishes to pursue this phase. (From February 28, 1995 Correspondence, James C. Schwartz, Acting Asst. Administrator, Water and Waste Rural Utilities Service, U.S. Dept. of Agriculture to Mr. Richard W. Beard, President, Scioto County Regional Water District No. 1 Authority.)

## VII. DECLARATORY JUDGEMENT ACT

1. Water 1 seeks a determination by this Honorable Court of the rights and liabilities of the parties pursuant to the Federal Declaratory Judgement Act with respect to their relationship as protected parties, contracting entities, permitter-permittee and grantor-grantee.

## IX. ATTORNEYS FEES

1. As a result of the conduct of SWI, Water 1 has found it necessary to retain the services of counsel.

2. Upon final trial of this action Water 1 seeks recovery of its attorney fees and costs of court pursuant to the Declaratory Judgement Act, 28 U.S.C. 2412 and Equal Access to Justice Act, 28 U.S.C. 2412.

## X. SUPPLEMENTAL JURISDICTION

1. The facts alleged heretofore are included here by reference as if fully set forth here.

2. This Court has supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367. The federal and state law claims arise from a common nucleus of operative facts.

## XI. OHIO COMMON LAW CLAIM — UNREASONABLE USE OF GROUNDWATER

1. Plaintiff Water 1 incorporates by reference as if fully rewritten herein all of the allegations and averments set forth above.

2. Ohio has adopted a reasonable use doctrine with reference to the use of underground or ground water. *Cline v. American Aggregates Corp.* (1984), 15 Ohio St. 3d 384.

3. Water 1 states that if SWI places its proposed wellfield and facility into operation, its withdrawal of ground water will unreasonably cause harm to the wellfield and ground water treatment facility of Water 1. In addition, especially during time of drought, SWI's proposed well capacity will exceed SWI's reasonable share of the annual supply or total store of ground water.

4. Water 1 requests that the Court enter a preliminary injunction enjoining SWI from operating the plant or, in the alternative, enjoining SWI from withdrawing ground water in such quantities so as to cause interference with Water 1's use of the aquifer. In addition, Water 1 requests monetary damages for harm to the quality and quantity of its water, due to SWI's brine discharge. Water 1 seeks monetary damages in an amount equal to the cost of modifying its ground water treatment facility to treat surface water in compliance with state and federal law (such redesign of the facility necessitated by installation of facilities a mere two (2) river miles upstream).

## XII. OHIO LAW — UNIFORM COMMERCIAL CODE

1. Water 1 incorporates by reference all of its allegations and averments set forth above.

2. Water 1 states that the contract between the parties and the course of dealing established between them imposes on both parties an obligation of good faith in the performance and enforcement of the contract and the course of dealing. The obligation of good faith imposed on SWI prohibits it from developing an alternative source of water to replace all or a substantial part of the water SWI purchases from Water 1 pursuant to the contract and course of dealing (Permittor-Permittee).

3. Additionally, the contract of the parties and the course of conduct of the parties over a period of more than 20 years imposes on the partys' requirements of specific performance; by Water 1 to provide adequate service for the demands of SWI and for SWI to purchase the water provided by Water 1 to fulfill SWI's water demand.

4. Water 1 requests that this Court enter preliminary and permanent injunctions against SWI to require it to continue to purchase water from Water 1 in an amount equal to the average monthly purchases pursuant to the contract and course of dealing established within the last twelve (12) months.

## PRAYER

WHEREFORE, premises considered, Plaintiff prays this Honorable Court:

1) Grant a temporary restraining order or, alternatively, a preliminary injunction to maintain the status quo by granting interim relief enjoining Defendants from:

   (a) operating the water treatment plant and wellfields which have been, or are currently being constructed;

   (b) disbursing, on the behalf of FmHA, and/or receiving on the part of SWI, any funds from any source to complete the project; whether said funds are "obligated" or not;

   (c) advertising or awarding bids on the project for which FmHA funds or any other funds would be required to fulfill such contracts;

   (d) obtaining any additional approvals, permits or licenses from any source;

(e) completing and/or operating the treatment plant by any other means;

2. Order that the project be placed on hold until such financial analysis of the stability of the system and the viability of the project can be obtained;

3. Upon trial of this case on the merits, determine the rights and liabilities of the parties;

4. Grant, upon trial of the case, a permanent injunction enjoining SWI from receiving any funds from *any* source and order FmHA not to disburse any funds, to complete the project seeking any approvals from the OEPA and ODNR for operation of the Project, and from developing or acquiring, directly or indirectly, any other source of water, either independently or from any other water supplier;

5. Grant an injunction ordering that proper notice and consultation be performed pursuant to ICA, should any project be allowed for new clearinghouse review pursuant to ICA;

6. Declare the acts of SWI to be *ultra vires*;

7. Declare, should the Court declare the acts of SWI *ultra vires*, any and all loan agreements between SWI and FmHA for the aforementioned project as void *ab initio*;

8. Order that the project be placed in the ownership of, or, alternatively, in the receivership of Water 1;

9. Order that FmHA write off as void *ab initio* or, alternatively, discount, its current loan to SWI for the aforementioned project;

10. Award attorneys fees and costs pursuant to 28 U.S.C. 2202 and/or 28 U.S.C. 2412;

11. Award damages as the Court may find Water 1 entitled; and

12. Grant such other and further relief, in law or in equity, as this Honorable Court should find Plaintiff justly entitled.

Respectfully submitted,

John W. Hust /s/ by R.S. Hill

John W. Hust, Esq.
State Bar No. 0027121
TRIAL ATTORNEY FOR
PLAINTIFF
SCIOTO COUNTY REGIONAL
WATER DISTRICT NO. 1
Schroeder, Maundrell,
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Louis T. Rosenberg /s/ by R.S. Hill

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(210) 225-5454

# AFFIDAVIT
# OF
# RICHARD BEARD

STATE OF OHIO
COUNTY OF SCIOTO

Comes now Richard Beard, being first duly cautioned and Sworn, states that he is the President of Scioto County Regional Water District No. 1, and that I have read the allegations in the foregoing Verified First Amended Complaint and that said allegations are true to the best of my knowledge, information and belief.

/s/ RICHARD BEARD
RICHARD BEARD

Sworn to before me and subscribed in my presence on this 23rd day of March 1995.

/s/ JANET EVANS
NOTARY

JANET EVANS
Notary Public,
State of Ohio
Commission Expires
Nov. 25, 1996

# FINANCIAL ASSISTANCE TO SMALL TOWNS AND RURAL GROUPS

- Water Systems
- Waste Disposal Systems

The Farmers Home Administration makes loans and grants to public bodies and nonprofit organizations primarily serving rural residents to develop domestic water supply systems and waste disposal systems.

*Who may receive assistance?*

Public or quasi-public bodies and corporations not operated for profit which will serve residents of open country and rural towns and villages up to 5,500 population, which are not part of an urban area, may receive financial and technical assistance in planning, developing and improving and extending water and waste disposal systems when:

1. They are unable to obtain needed funds from other sources at reasonable rates and terms.

2. The proposed improvements will primarily serve farmers, ranchers, farm tenants, farm laborers, and other rural residents.

3. They have legal capacity to borrow and repay the loan, to pledge security for loans, and to operate the facilities or services.

4. They are financially sound and will be effectively organized and managed.

*What about grants?*

When needed, applicants may obtain grants up to 50 percent of the development cost of a domestic water or waste disposal system.

No financial assistance shall be provided until the Farmers Home Administration determines that the water or

sewer system (a) is designed and constructed so that adequate capacity will be or can be made available to serve the present population of the area plus reasonably foreseeable population growth, (b) is necessary for orderly community development and not inconsistent with planned development under State, county and municipal plans approved as official plans for the area.

*How may funds be used?*

Loans and grant funds may be used to:

• Install, repair, improve, or expand rural water supply and distribution systems including water supply reservoirs; pipelines; wells; pumping plants and water filtration, chlorination, fluoridation, and iron removal facilities that furnish water for household, livestock, garden irrigation, orchard and crop spraying purposes, fire protection and commercial and industrial use.

• Purchase a water supply or a water right.

• Install, repair, improve, or expand waste collection, treatment, or disposal systems. Facilities to be financed may include such items as sewer lines, treatment plants, settling basins and lagoons.

• Pay engineers, attorneys, construction foremen, and laborers needed in the planning and installation of the facilities.

• Pay other costs related to the improvements, including and acquisition of rights-of-way and easements, relocation of roads and utilities, and construction of service lines.

All designs must be approved by state health departments and all pipeline material must meet recognized standards of quality. Requirements for water treatment and water quality control are maintained at levels acceptable to state and local health departments. Every system financed by FHA must be

designed in compliance with state and local codes, zoning regulations and any existing development plans for the area.

7 USC § 1926

associations, including corporations not operated for profit, Indian tribes on Federal and State reservations and other federally recognized Indian tribes, and public and quasi-public agencies to provide for the application or establishment of soil conservation practices, shifts in land use, the conservation, development, use, and control of water, and the installation or improvement of drainage or waste disposal facilities, recreational developments, and essential community facilities including necessary related equipment, all primarily serving farmers, ranchers, farm tenants, farm laborers, and other rural residents and to furnish financial assistance or other aid in planning projects for such purposes. When any loan made for a purpose specified in this paragraph is sold out of the Agricultural Credit Insurance Fund as an insured loan, the interest or other income thereon paid to an insured holder shall be included in gross income for purposes of chapter 1 of the Internal Revenue Code of 1954 [26 USCS §§ 1 et seq.]. With respect to loans of less than $500,000 made or insured under this paragraph that are evidenced by notes and mortgages, as distinguished from bond issues, borrowers shall not be required to appoint bond counsel to review the legal validity of the loan whenever the Secretary has available legal counsel to perform such review.

(2) The Secretary is authorized to make grants aggregating not to exceed $500,000,000 in any fiscal year to such associations to finance specific projects for works for the development, storage, treatment, purification, or distribution of water or the collection, treatment, or disposal of waste in rural areas: Provided, That for fiscal years commencing after September 30, 1981, such grants may not exceed

$154,900,000 in any fiscal year. The amount of any grant made under the authority of this paragraph shall not exceed 75 per centum of the development cost of the project to serve the area which the association determines can be feasibly served by the facility and to adequately serve the reasonably foreseeable growth needs of the area.

(3) No grant shall be made under paragraph (2) of this subsection in connection with any project *unless the Secretary determines that the project (i) will serve a rural area which, if such project is carried out, is not likely to decline in population below that for which the project was designed,* (ii) is designed and constructed so that adequate capacity will or can be made available to serve the present population of the area to the extent feasible and to serve the reasonably foreseeable growth needs of the area, and (iii) is necessary for an orderly community development consistent with a comprehensive community water, waste disposal, or other development plan of the rural area and not inconsistent with any planned development provided in any State, multijurisdictional, county, or municipal plan approved by competent authority for the area in which the rural community is located, and the Secretary shall require the submission of all applications for financial assistance under this section to the multijurisdictional substate areawide general purpose planning and development agency that has been officially designated as a

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

SCIOTO COUNTY REGIONAL WATER DISTRICT NO. 1,

*Plaintiff*

vs.

SCIOTO WATER, INC.,

*Defendant*

CASE NO. C-1-95-204

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Plaintiff's Complaint for Temporary Restraining Order; Alternatively, Preliminary Injunction and Permanent Injunction has been forwarded by United States Mail on this 24th day of March, 1995 to the following:

Steven L. Mowery, Esq.
8585 Ohio River Road, C.B. 83-05
Wheelersburg, OH 45694

Susanne Cetrulo, Esq.
Ware, Bryson West & Kummer
157 Barwood Drive
Edgewood, KY 41017

JOHN W. HUST /s/ R.S. Hill
John W. Hust

CASE NO. C-1-95-204
(Rubin, J.)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

SCIOTO COUNTY REGIONAL
WATER DISTRICT NO. 1,
AUTHORITY
*Plaintiff*

vs.

SCIOTO WATER, INC.,
*Defendant*

and

RICHARD ROMINGER,
Acting Secretary, U.S. Department of Agriculture,
Rural Economic and Community Development Service
(formerly Farmers Home Administration)
*Defendant.*

Filed May 17, 1995
??? Murphy, Clerk
Cincinatti, Ohio

**MOTION FOR LEAVE TO SUPPLEMENT AMENDED COMPLAINT**

COMES NOW, SCIOTO COUNTY WATER DISTRICT NO. 1, AUTHORITY, Plaintiff, by and through Counsel, and files this Motion for Leave to Supplement Amended Complaint and shows the Court as follows:

1. Plaintiff seeks leave of Court to Supplement it's Amended Complaint to add to the jurisdictional statement additional jurisdictional authority for this Court to provide the various forms of equitable and ancillary relief requested,

and to set forth the bases on the jurisdictional authority cited.

2. Section II of the Amended Complaint regarding "Jurisdiction", would be supplemented as follows:

JURISDICTION

1. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 based on federal question claims raised under 7 U.S.C. § 1926(b). Jurisdiction is conferred on this Court pursuant to the Intergovernmental Cooperation Act, 31 U.S.C. § 6501 *et. seq.* and the Administrative Procedures Act, 5 U.S.C. § 551 *et seq.*, particularly 5 U.S.C. § 701 *et seq.*

2. Moreover, this Court has jurisdiction pursuant to the All Writs Act, 28 U.S.C. § 1651 *et. seq.* This Court also has jurisdiction pursuant to the Federal Declaratory Judgement Act, 28 U.S.C., § 2201 and § 2202, and the Mandamus and Venue Act, 28 U.S.C. § 1361.

3. Section VII of the Amended Complaint will be supplemented as follows:

VII.A. ADMINISTRATIVE PROCEDURES ACT

1. WATER 1 asserts that Defendant has engaged in conduct contrary to its own rules in funding the SWI project. FmHA rules require that funding of a project occur *after* final approval by state agencies from whom approval must be acquired. Approval of the construction permit was not final for the SWI project when FmHA disbursed funds to begin construction. Moreover, FmHA has not conducted the assessment of SWI's financial condition for SWI to qualify for the loans and grants FmHA has awarded and disbursed, which is required under its regulations.

2. WATER 1 seeks injunction pursuant to the Administrative Procedures Act, 5 U.S.C. § 706, to enjoin FmHA

from taking any further funding or disbursement actions, that the grant and loan awards to SWI be voided, and all liens of the FmHA created under this project be voided.

## VII.B. MANDAMUS AND VENUE ACT

1. WATER 1 asserts that FmHA failed in assessing the financial viability of SWI in qualifying for federal loan and grant assistance, and to acknowledge WATER 1's entitlement to § 1926(b) protection, and all of these actions violate the Administrative Procedures Act and the Intergovernmental Cooperation Act, funding a project which violates § 1926(b).

2. WATER 1 seeks a writ of Mandamus pursuant to the Mandamus and Venue Act, to order the Defendant to assess the financial viability and qualification of Defendant, SWI, to acknowledge and consider WATER 1's entitlement to 7 U.S.C. § 1926(b) protection as amended, P.L. 100-233 § 803(g), to cease funding of the SWI project until such assessment has been completed, and to withdraw funding entirely if it is shown that SWI cannot meet its financial and statutory obligations to provide low cost, potable water and repay its loans.

4. The Prayer in the Amended Complaint will be supplemented as follows:

> 8. Order pursuant to the All Writs Act, that the project be placed in the ownership or, in the receivership of WATER 1, alternatively against a trustee and/or create a constructive trust;
>
> 12. Grant any and all relief available pursuant to the All Writs Act;
>
> 13. Order, pursuant to the Administrative Procedures Act, that FmHA be enjoined from any further disbursement or award of funding, by grant or loan, to the SWI project, that FmHA acknowledge 1926(b)

protection of WATER 1 and consider same in assessing SWI project qualification, that grants and loans made by FmHA be voided, and all liens associated with this project be voided, and financial assessment conducted on SWI's financial qualifications for grant and loan funds.

14. Issue a Writ of Mandamus for FmHA to halt funding of the project until the state approval process is final, the financial assessment is completed and considered, and WATER 1 is consulted regarding the effect of the project with acknowledgment of WATER 1's protection under 7 U.S.C. 1926(b), as amended.

15. Grant such other and further relief, in law or in equity, as this Honorable Court should find Plaintiff justly entitled.

5. The supplementing paragraphs are attached hereto as "Exhibit A".

## PRAYER

WHEREFORE PREMISES CONSIDERED, Plaintiff prays the Court grant leave to Supplement its Amended Complaint and award such other and further relief, in law or

in equity, to which this Honorable Court should find Plaintiff justly entitled.

Respectfully submitted,

/s/ JOHN W. HURST
John W. Hurst, Esq.
State Bar No. 0027121

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TRIAL ATTORNEY FOR
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(210) 225-5454

TRIAL ATTORNEY FOR
PLAINTIFF
SCIOTO COUNTY REGIONAL
WATER DISTRICT NO. 1

## CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion for Leave to Supplement Amended Complaint has been served upon the following by Certified Mail, Return Receipt Requested, on this the 16th day of May, 1995.

Steven L. Mowery, Esq.
Mowery, Brown and Blume
Attorneys at Law
8595 Ohio River Road
Wheelersburg, Ohio 45694
Attorney for Scioto Water, Inc.

Susanne Certrulo, Esq.
157 Barnwood Drive
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Attorney for Scioto Water, Inc.

Tim Coombe, U.S. Attorney
U.S. Attorney's Office
Potter Street Building, Room 220
Cincinnati, OH 45202
Attorney for U.S. Dept. of Agriculture

/s/ JOHN W. HUST

CASE NO. C-1-95-204
(Rubin, J.)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

SCIOTO COUNTY REGIONAL
WATER DISTRICT NO. 1,
AUTHORITY

*Plaintiff*

vs.

SCIOTO WATER, INC.

and

RICHARD ROMINGER,
Acting Secretary, U.S. Department
of Agriculture, Rural Economic
and Community Development Service
(formerly Farmers Home Administration)

*Defendant.*

**ORDER FOR LEAVE TO
SUPPLEMENT AMENDED COMPLAINT**

On this day came to be considered Plaintiff's Motion to Leave to Supplement Amended Complaint and the Court is of the opinion that said Motion is meritorious and should therefore be GRANTED.

IT IS THEREFORE ORDERED that Leave to Supplement Plaintiff's Amended Complaint is hereby

GRANTED. Said Amended Complaint will be supplemented as per attached "Exhibit A".

AND IT IS SO ORDERED.

SIGNED this day of , 1995.

HONORABLE SANDRA BECKWITH,
UNITED STATES DISTRICT JUDGE

## EXHIBIT "A"

## SUPPLEMENTS TO AMENDED COMPLAINT

Section II of the Amended Complaint regarding "Jurisdiction," would be supplemented as follows:

### JURISDICTION

1. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 based on federal question claims raised under 7 U.S.C. § 1926(b). Jurisdiction is conferred on this Court pursuant to the Intergovernmental Cooperation Act, 31 U.S.C. § 6501 *et seq.* and the Administrative Procedures Act, 5 U.S.C. § 551 *et seq.*, particularly 5 U.S.C. § 701 *et seq.*

2. Moreover, this Court has jurisdiction pursuant to the All Writs Act, 28 U.S.C. § 1651 *et seq.* This Court also has jurisdiction pursuant to the Federal Declaratory Judgement Act, 28 U.S.C. § 2201 and § 2202, and the Mandamus and Venue Act, 28 U.S.C. § 1361.

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2. WATER 1 seeks injunction pursuant to the Administrative Procedures Act, 5 U.S.C. § 706, to enjoin FmHA from taking any further funding or disbursement actions, that the grant and loan awards to SWI be voided, and all liens of the FmHA created under this project be voided.

## VII.B. MANDAMUS AND VENUE ACT

1. WATER 1 asserts that FmHA failed in assessing the financial viability of SWI in qualifying for federal loan and grant assistance, and to acknowledge WATER 1's entitlement to § 1926(b) protection, and all of these actions violate the Administrative Procedures Act and the Intergovernmental Cooperation Act, funding a project which violates § 1926(b).

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The Prayer in the Amended Complaint will be supplemented as follows:

> 8. Order pursuant to the All Writs Act, that the project be placed in the ownership or, in the receivership of WATER 1, alternatively against a trustee and/or create a constructive trust;
>
> 12. Grant any and all relief available pursuant to the All Writs Act;
>
> 13. Order, pursuant to the Administrative Procedures Act, that FmHA be enjoined from any further

disbursement or award of funding, by grant or loan, to the SWI project, that FmHA acknowledge 1926(b) protection of WATER 1 and consider same in assessing SWI project qualification, that grants and loans made by FmHA be voided, and all liens associated with this project be voided, and financial assessment conducted on SWI's financial qualifications for grant and loan funds.

14. Issue a Writ of Mandamus for FmHA to halt funding of the project until the state approval process is final, the financial assessment is completed and considered, and WATER 1 is consulted regarding the effect of the project with acknowledgment of WATER 1's protection under 7 U.S.C. 1926(b), as amended.

15. Grant such other and further relief, in law or equity, as this Honorable Court should find Plaintiff justly entitled.

MOTION FILED
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No. 96-1498

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IN THE
SUPREME COURT of the UNITED STATES
October Term, 1996

SCIOTO COUNTY REGIONAL WATER
DIST. NO. 1, AUTHORITY
Petitioner

v.

SCIOTO WATER, INC., ET AL
Respondents

On Petition For Writ of Certiorari
to the United States Court of Appeals
For the Sixth Circuit

# OPPOSED MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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Bell Arthur Water Corporation ***("Bell Arthur")***, Eastern Pines Water Corp. ***("Eastern Pines")***, North Alamo Water Supply Corporation ***("North Alamo")***, Bear Creek Water Association, Inc. ***("Bear Creek")***, Rural Water System #1 ***("RWS")***, Mississippi Rural Water Association ***("MRWA")***, Oklahoma Rural Water Association ***("ORWA")*** and North Carolina Rural Water Association ***("NCRWA")*** (hereinafter, jointly referred to as ***"Movants")*** hereby request leave to file an amicus curiae brief in support of Petitioner, Scioto County Regional Water District No. 1, Authority ***("Water 1")***, and in support of their request respectfully show the following:

1. Movants are or represent utilities indebted to the federal government, who have asserted or are interested in asserting the protections of 7 U.S.C. Section 1926(b) ***("Section 1926(b)")***.

2. Bell Arthur is a nonprofit water supply corporation serving a population of approximately 11,200 persons in Pitt County, North Carolina. Bell Arthur has financed the construction and operation of its water system through a series of loans and grants from the Farmer's Home Administration ***("FmHA")***. The present sum of these FmHA loans and grants total in excess of One Million Seven Hundred Fifty Thousand Dollars ($1,750,000.00). In 1988, Bell Arthur purchased its notes from the FmHA under the purchase program promulgated by the United States Department of Agriculture ***("USDA")*** pursuant to Section 1001(f) of the Omnibus Budget Reconciliation Act of 1986 ***("OBRA")***. Bell Arthur is also a party in Bell Arthur Water Corp. v. Greenville Utilities Commission, City of Greenville, N.C. and Ironwood Development, Inc., No. 4:95-CV-122-H(2), currently pending in the U.S. District Court for the Eastern District of North Carolina, which involves the same question presented in this case. Bell Arthur may lose over one-third of its customer base in the event that the protections of Section 1926(b) do not extend to purchase program participants.

3. Eastern Pines is a nonprofit water supply corporation providing water to approximately 22,000 households in Pitt County, North Carolina. Eastern Pines also participated in the Section 1001(f) purchase program. The potential financial loss to Eastern Pines should Section 1926(b) protection not extend to purchase program participants could be in excess of Ten Million Dollars ($10,000,000.00).

4. North Alamo is a nonprofit water supply corporation providing potable water to areas of Hidalgo County, Texas. Bear Creek is a nonprofit water supply corporation which provides water service to rural residents of Mississippi. North Alamo and Bear Creek are presently indebted to FmHA. North Alamo and Bear Creek have each previously been a party to Section 1926(b) litigation. *See*, North Alamo Water Supply Corporation v. City of San Juan, Texas, 90 F.3d 910 (5th Cir. 1996), *cert. denied* (U.S. Dec. 9, 1996) (No. 96-668); City of Madison, Miss. v. Bear Creek Water Association, Inc., 816 F.2d 1057 (5th Cir. 1987). Both North Alamo and Bear Creek are particularly interested in the outcome of this litigation because the FmHA is presently implementing purchase programs whereby qualified indebted associations, such as North Alamo and Bear Creek, would be compelled to retire their FmHA debt. Loss of Section 1926(b) protection to North Alamo and Bear Creek under such circumstances could result in losses in excess of Twenty Million Dollars ($20,000,000.00).

5. RWS is a nonprofit water supply corporation presently serving over 1,100 rural residential households primarily in Sioux County, Iowa. In 1988, RWS participated in the Section 1001(f) purchase program and is a party in Rural Water System #1 v. City of Sioux Center, Iowa, Civ. No. C95-4112-MWB, currently pending in the U.S. District Court for the Northern District of Iowa, litigating the same question presented in this case. RWS is presently indebted to FmHA and has pledged its entire water delivery system as collateral for said FmHA loan. In the event that the protections of Section 1926(b) do not extend to purchase program participants, the ability of RWS to repay its FmHA debt is substantially threatened.

6. NCRWA, MRWA, and ORWA are nonprofit associations comprised of rural water utilities formed for the purpose of advancing the interests of these utilities. NCRWA, MRWA and ORWA together represent in excess of 1,600 active member utilities who serve approximately 2.3 million customers throughout the states of North Carolina, Mississippi and Oklahoma. Most of the members of NCRWA, MRWA and ORWA have financed their operations through FmHA loans and grants. Many of their members have participated in the Section 1001(f) purchase program and are greatly affected by the decision of the Sixth Circuit to deny Section 1926(b) protection to purchase program participants. Potential losses to NCRWA, MRWA and ORWA members in the event Section 1926(b) protection is denied to these program participants are substantial. Losses to members of NCRWA and ORWA, alone, could easily exceed One Hundred Thirty Million Dollars ($130,000,000.00).

7. As set forth in their Brief, Movants believe that the Sixth Circuit Court's interpretation and application of OBRA Section 1001(f) is inconsistent with the prior rulings of this Court and is in direct conflict with the decision of the Colorado Supreme Court in City of Grand Junction v. Ute Water Conservacy District, 900 P.2d 81 (Colo. 1995). The decision below severely jeopardizes the ability of Section 1001(f) program participants, such as Amicus, Bell Arthur, Eastern Pines and RWS, and members of Amicus, NCRWA, MRWA and ORWA, to repay their debt and to remain financially viable. Thus, Movants are affected, or potentially affected, by this Court's decision respecting the Sixth Circuit's ruling. The interests of Movants are not remote but are very much related to the specific issues in this case. It is appropriate and desirable, and Movants believe it will be a benefit to this Court, that Movants be

granted permission to file this amicus curiae brief to address certain issues raised in this case. Movants' brief is submitted with this Motion pursuant to S.Ct.R. 37(2)(b).

8. After consultation with same, Steven L. Mowery, counsel for Respondent, Scioto Water, Inc., and James Coombe, counsel for Respondent, U.S.D.A. have withheld their consent to the filing of Movants' Brief as amicus curiae, and Ralph Tarr, counsel for Petitioner, Water 1, Authority, has consented to the filing of Movants' Brief as amicus curiae.

WHEREFORE, PREMISES CONSIDERED, Movants respectfully request that they be given leave to file their amicus brief in support of Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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# AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF CERTIORARI *(OPPOSED)*

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## INTEREST OF AMICUS CURIAE

Amici are Bell Arthur Water Corporation, Eastern Pines Water Corp., North Alamo Water Supply Corporation, Bear Creek Water Association, Inc., Rural Water System #1, Mississippi Rural Water Association, Oklahoma Rural Water Association and North Carolina Rural Water Association.

Bell Arthur Water Corporation ***("Bell Arthur")*** is a nonprofit water supply corporation serving a population of approximately 11,200 persons in the southwestern portion of Pitt County, North Carolina. Bell Arthur's service area is comprised of approximately 71,195 acres. Bell Arthur has financed the construction and operation of its water system through a series of loans and grants from the Farmer's Home Administration ***("FmHA")***. The sum of these FmHA loans and grants total in excess of One Million Seven Hundred Fifty Thousand Dollars ($1,750,000.00).

Bell Arthur's FmHA notes were selected for sale under Section 1001(f) of the Omnibus Budget Reconciliation Act of 1986 ***("OBRA")***, as amended by the Agricultural Credit Act of 1987 ***("ACA")***. In 1988, Bell Arthur exercised its right of first refusal under OBRA Section 1001(f) and purchased its notes from FmHA under the purchase program promulgated by the United States Department of Agriculture ***("USDA")***, pursuant to OBRA Section 1001(f) ***("Section 1001(f) purchase program")***.

Bell Arthur is also a party in Bell Arthur Water Corp. v. Greenville Utilities Commission, City of Greenville, N.C. and Ironwood Development, Inc., No. 4:95-CV-122-H(2), currently pending in the U.S. District Court for the Eastern District of North Carolina, which

involves the same question presented in this case.

Bell Arthur could potentially suffer a loss of thirty-eight (38%) percent of its customer base in the event that the protections of 7 U.S.C. §1926(b) ***("Section 1926(b)")*** do not extend to purchase program participants. The loss of these customers threatens the solvency of Bell Arthur and its ability to continue to operate and provide water service to its customers. At the very minimum, denial of Section 1926(b) protections under these circumstances would result in extreme increases in water rates to its remaining customers, affecting thousands of North Carolina households.

Eastern Pines Water Corporation ***("Eastern Pines")*** is a nonprofit water supply corporation formed to provide water to residents in Pitt County, North Carolina. Eastern Pines has a service area of approximately 121,787 acres and serves approximately 22,000 households. Eastern Pines has previously financed the construction and operation of its water system with FmHA loans and grants and also participated in the Section 1001(f) purchase program. The potential financial loss to Eastern Pines should Section 1926(b) protection not extend to purchase program participants could be in excess of Ten Million Dollars ($10,000,000.00).

North Alamo Water Supply Corporation ***("North Alamo")*** is a nonprofit water supply corporation formed to provide potable water to areas of Hidalgo County, Texas. North Alamo has financed the construction and operation of its water system with loans and grants from the FmHA. The sum of these FmHA loans and grants presently total in excess of Eleven Million Dollars ($11,000,000.00).

Bear Creek Water Association, Inc. ***("Bear Creek")*** is a nonprofit water supply corporation which provides water service to rural residents of Mississippi. Bear Creek has also financed the construction and operation of its water system with loans and grants from the FmHA and is presently indebted to FmHA.

Both North Alamo and Bear Creek have previously been a party to Section 1926(b) litigation. *See*, North Alamo Water Supply Corporation v. City of San Juan, Texas, 90 F.3d 910 (5th Cir. 1996), *cert. denied* (U.S. Dec. 9, 1996) (No. 96-668); City of Madison, Miss. v. Bear Creek Water Association, Inc., 816 F.2d 1057 (5th Cir. 1987). North Alamo and Bear Creek are particularly interested in the outcome of this litigation because the FmHA is presently implementing purchase programs whereby qualified indebted associations, such as North Alamo and Bear Creek, would be compelled to retire their FmHA debt. Loss of Section 1926(b) protection to North Alamo and Bear Creek under such circumstances could result in losses in excess of Twenty Million Dollars ($20,000,000.00).

Rural Water System #1 ***("RWS")*** is a nonprofit water supply corporation serving approximately 1,100 rural residential households primarily in Sioux County, Iowa. RWS has financed the construction and operation of its water system through a series of loans and grants from the FmHA. The sum of RWS's outstanding FmHA loans and grants presently total in excess of Three Million Dollars ($3,000,000.00). RWS has pledged its entire water delivery system as collateral for its FmHA loans.

RWS is a party in Rural Water System #1 v. City of Sioux Center, Iowa, Civ. No. C95-4112-MWB

(N.D.W.D.IA.), currently pending in the U.S. District Court for the Northern District, Western Division of Iowa, wherein the same question presented in this case is being litigated.

RWS relies on Section 1926(b) protection to maintain its customer base and ability to repay its FmHA debts. In the event that the protections of Section 1926(b) do not extend to purchase program participants, the ability of RWS to repay its FmHA debt and remain a viable rural water service provider is substantially threatened.

Mississippi Rural Water Association ***("MRWA")*** is a nonprofit association comprised of rural water utilities formed for the purpose of advancing the interests of these utilities in providing water to residents of Mississippi. MRWA presently has 797 active member utilities who serve approximately 806,352 customers throughout the state of Mississippi. Most of MRWA's members have financed their operations through FmHA loans and grants. Many MRWA members have participated in the Section 1001(f) purchase program and are greatly affected by the decision of the Sixth Circuit to deny Section 1926(b) protection to purchase program participants. In the event Section 1926(b) protection is denied to these program participants substantial losses to MRWA members are likely.

Oklahoma Rural Water Association ***("ORWA")*** is a nonprofit association comprised of rural water utilities formed for the purpose of advancing the interests of these utilities in providing water to residents of Oklahoma. ORWA presently has 430 active member utilities who serve over 600,000 customers throughout the state of Oklahoma. Most of ORWA's members have financed their operations through FmHA loans and grants. Two Hundred and

Twelve (212) ORWA members have participated in the Section 1001(f) purchase program and are greatly affected by the decision of the Sixth Circuit to deny Section 1926(b) protection to purchase program participants. In the event Section 1926(b) protection is denied to these program participants losses to these ORWA members in excess of Eighty Million Dollars ($80,000,000.00) could result.

North Carolina Rural Water Association ***("NCRWA")*** is a nonprofit association comprised of rural water utilities formed for the purpose of advancing the interests of these utilities in providing water to residents of North Carolina. NCRWA presently has 455 active member utilities who serve approximately 913,360 customers throughout the state of North Carolina. Most of NCRWA's members have financed their operations through FmHA loans and grants. Many NCRWA members, such as fellow amicus Bell Arthur and Eastern Pines, have participated in the Section 1001(f) purchase program and are greatly affected by the decision of the Sixth Circuit to deny Section 1926(b) protection to purchase program participants. Potential losses to NCRWA members in the event Section 1926(b) protection is denied to these program participants could exceed Fifty Million Dollars ($50,000,000.00).

This is a case of first impression in the federal courts. The issues presented in this suit are critical to rural water utility providers nationwide, and directly affect hundreds of thousands of households who rely on these entities to provide low cost water service. These rural water utility providers rely on Section 1926(b) protection to maintain their customer base and the financial viability of their operations. By holding that Section 1926(b) protection does not extend to Section 1001(f) purchase program participants, the Sixth Circuit has directly contradicted the

opinion of the Colorado Supreme Court in the Ute case. *See*, City of Grand Junction v. Ute Water Conservacy District, 900 P.2d 81 (Colo. 1995). The Sixth Circuit decision severely jeopardizes the ability of these purchase program participants to repay their debt and to remain financially viable as rural water suppliers. The importance of the issues presented in this case to water utilities nationwide cannot be overemphasized. It is for this reason that the forenamed amicus submit this brief in support of Petitioner Scioto County Regional Water Dist. No. 1, Authority's Petition for Writ of Certiorari.

## ARGUMENT

## REASONS FOR GRANTING THE WRIT

### I. The Sixth Circuit's opinion directly conflicts with the Colorado Supreme Court's ruling in City of Grand Junction v. Ute Water Conservacy District, 900 P.2d 81 (Colo. 1995).

The decision below is in direct conflict with the decision of the Colorado Supreme Court in Ute.

Amici maintain that the analysis underlying the Sixth Circuit's opinion is flawed and directly contradicts the decision in Ute, the only other case which has considered the applicability of Section 1926(b) to Section 1001(f) purchase program participants.

7 U.S.C. §1926(b) is part of a comprehensive federal program to provide FmHA loans to rural water providers in furtherance of a national policy to insure the availability of water to residents of rural areas. The legislative history of the statute indicates two Congressional purposes for its

enactment. 1) To encourage rural water development by expanding the number of potential users of such systems, thereby decreasing the per-user cost, and 2) to safeguard the viability and financial security of such associations (and FmHA's loans) by protecting them from the expansion of nearby cities and towns. North Alamo, 90 F.3d at 96; Bear Creek, 816 F.2d at 1059. As noted first in Bear Creek, and most recently in North Alamo, Congress' intent to protect territories of providers of rural water services against competitive services by municipalities and other public bodies is clearly evidenced by the Legislative history of the Statute:

> "This provision authorizes the very effective program of financing the installation and development of domestic water supplies and pipelines serving farmers and others in rural communities. By including service to other rural residents, the cost per user is decreased and the loans are more secure in addition to the community benefits of a safe and adequate supply of running household water. A new provision has been added to assist in protecting the territory served by such an association against competitive facilities, which might otherwise be developed with the expansion of municipal and other public bodies into an area served by the rural system." S. Rep. No. 566, 87th Cong., 1st Sess., reprinted in 1961 U.S. Code Cong. & Admin. News 2243, 2309.

North Alamo at 96; Bear Creek at 1060.

Rural water providers require and rely on Section

1926(b) to maintain their customer base and ensure their continued financial viability so that they can provide water service at the lowest per user cost possible. Without the protection of Section 1926(b), municipalities bordering the service area of these rural water utilities would be allowed to encroach on these service areas and deprive the rural water provider of those portions of its service area with the greatest concentration of customers and those areas where the greatest potential for future growth lies. As a result of such encroachment the rural water provider is deprived of large portions of its customer base and a substantial portion of its revenues, ultimately resulting in substantially increased water rates to its remaining customers and quite possibly bankruptcy. It is the viability of these water service providers which Congress sought to protect by enactment of Section 1926(b). Whenever Section 1926(b) protection is limited, or as in this case denied, to a rural water service provider, the very existence of the rural water utility is threatened and Congress' legislative scheme to ensure the availability of water service to rural areas is undermined.

All of the federal courts that have interpreted Section 1926(b) have agreed that the statute should be construed broadly to prevent municipal encroachment on a rural water association's service area by means of annexation or grant of a private franchise. North Shelby Water Company v. Shelbyville Municipal Water and Sewer Commission, 803 F.Supp., 15, 21 (E.D.Ky. 1992); *See also*, Jennings Water, Inc. v. City of North Vernon, Ind., 682 F. Supp. 421, 425 (S.D. Inc. 1988), aff'd, 895 F.2d 311 (7th Cir. 1989)("The statute is unequivocal -- it prohibits any curtailment or limitation of the service provided by a rural association by municipal expansion"); Bear Creek at 1059; North Alamo at 96.

The Subdivision (g) amendment to OBRA expressly extended the protection of 7 U.S.C. § 1926(b) to all notes and other obligations "sold or intended to be sold" under Section 1001 of OBRA 1986, as amended. There is no language in the statute which denies Section 1926(b) protection to borrowers who purchase their notes and bonds under the purchase programs contemplated and implemented under subdivision (f).

The decision below is in direct conflict with the Colorado Supreme Court's decision in Ute. The court in the Ute case, held that Section 1926(b) protection extended to a water district who reacquired its bond from the FmHA under the Section 1001(f) purchase program. The Colorado Supreme Court primarily based its decision on settled principles of statutory construction and an examination of the comprehensive scheme which Congress has enacted to protect rural water districts. The court noted:

> "The fact that Congress provided for a comprehensive scheme for selling bonds held by the FmHA back to the issuers also supports our conclusion that *Congress intended to allow an issuer to reacquire its bond or note without losing the protection provided under Section 1926(b).*"(emphasis added).

Ute at 92.

The decision below relies heavily on common law rules regarding the extinguishment of debt and incorrectly attributes the decision of the Court in Ute to Colorado state law. A reading of the Ute case demonstrates that the Colorado Supreme Court did not base its' decision on

Colorado state law as asserted by the Sixth Circuit. The Colorado Supreme Court only cited Colorado state law as additional, not controlling, support for its decision.

Unlike the court in Ute, the decision below completely ignored the unambiguous and clear wording of OBRA, as amended by ACA, as well as one of the fundamental purposes underlying the entire FmHA loan program: to safeguard the viability and financial security of such associations by protecting them from the expansion of nearby cities and towns. North Alamo, 90 F.3d at 96; Bear Creek, 816 F.2d 1057, 1059. The Sixth Circuit completely overlooked the fact that the protections afforded by Section 1926(b) are intended to benefit not only the FmHA but also the rural water provider and its rural water member/customers.

These FmHA loan programs are part of a congressional scheme to subsidize rural water authorities so as to encourage rural water development. Bear Creek at 1061. Enactment of ACA 1987 was Congress' effort to effect meaningful reform of the agricultural credit sector, including FmHA lending. The intent of its provisions was to protect borrowers, such as Scioto County Regional Water District No. 1, Authority ***("Water 1")***, not penalize them.

The Ute decision presents the better reasoned approach. The conflict between its ruling and the decision of the court below is clear and irreconcilable. To allow the conflict in these decisions to stand will invite piecemeal litigation of this issue, resulting in increased costs of litigation to rural water providers, the very danger warned against by the Fifth Circuit in Bear Creek where the court, with particular emphasis on the burden and costs of making factual determinations, enunciated a bright-line rule

regarding the applicability of Section 1926(b). *See*, Bear Creek at 1059.

Amicus are aware of two other pending suits involving this issue and given that at least a thousand other entities participated in the Section 1001(f) purchase program, many more cases are certain to follow. Eg. Rural Water System #1 v. City of Sioux Center, Iowa, Civ. No. C95-4112-MWB (N.D.W.D.IA.); Bell Arthur Water Corp. v. Greenville Utilities Commission, City of Greenville, N.C. and Ironwood Development, Inc., No. 4:95-CV-122-H(2).

The thousands of entities and their customers likely to be affected by conflicting authority on this issue require guidance from this Court and a well reasoned decision determining the law on this issue. The importance of this issue to these many persons should weigh heavily in favor of this Court granting the Petition for Writ of Certiorari.

**II. The Sixth Circuit's Opinion Is Contrary to the Court's Settled Principles of Statutory Construction.**

A plain reading of OBRA, as amended by ACA, as well as the application of well settled rules of statutory construction argues in favor of extending Section 1926(b) protection to the Water 1 bond purchase transaction.

OBRA, as amended by ACA, subsection(g) provides as follows: "7 U.S.C. §1926(b).... shall be applicable to all notes or other obligations sold or intended to be sold under Section 1001 of the Omnibus Reconciliation Act of 1986."

The resolution of an issue of federal statutory construction begins with an analysis of the language of the statute itself, and absent a clearly expressed legislative

intention to the contrary, the plain language of the statute controls its construction. In every case involving the interpretation of a federal statute, the analysis must begin with the language employed by Congress. Howe v. Smith, 452 U.S. 473 (1981). In a statutory construction case, the beginning point must be the language of the statute, and when the statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but most extraordinary circumstances, is finished. Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 112 S.Ct. 2589 (1992). It should be assumed that the ordinary meaning of the language used by Congress accurately expresses the legislative purpose. ParknFly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194, 105 S.Ct. 658, 662 (1985). Courts should disfavor interpretations of statutes that render language superfluous. Connecticut Nat. Bank v. Germain, 503 U.S. 249, 253, 112 S.Ct. 1146, 1149 (1992)("Congress says in a statute what it means and means in a statute what it says there.")

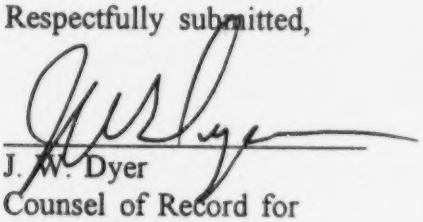
OBRA, as amended by ACA, clearly speaks in terms of all notes..."sold or intended to be sold" under Section 1001. The plain meaning of the statute directs that the protection of 7 U.S.C. §1926(b) extend to all notes selected by the Secretary to be sold, regardless of whether a sale is actually completed to a third party purchaser or the FmHA borrower/purchaser. To rule that the intent of Congress was to extend such protection only to obligations actually "sold" to third party purchasers would be to render the phrase "intended to be sold" superfluous and a nullity.

The decision below completely ignores these settled rules of statutory construction and warrants review by the Court. Certiorari is appropriate under these circumstances.

## CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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In The
# Supreme Court of The United States
October Term 1996

SCIOTO COUNTY REGIONAL WATER DISTRICT NO. 1, AUTHORITY,
*Petitioner,*

v.

SCIOTO WATER, INC.; DANIEL R. GLICKMAN, Secretary, U.S. Department of Agriculture, Rural Economic and Community Developement Service (formerly Farmers Home Administration)
*Respondents.*

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Sixth Circuit
Case Nº 95-3918

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Can Water 1 state any claim for relief under 7 U.S.C. §1926(b), as amended by 7 U.S.C. 1929(a)(the Consolidated Farm and Rural Development Act of 1961 and the Agricultural Credit Act of 1987) when it has not been a federally indebted agency since 1989, but rather, chose to discount its prior indebtedness and obtain private funding?

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## STATEMENT OF THE CASE

### I. STATEMENT OF FACTS

The Respondent, Scioto Water, Inc., (SWI) does not accept the Petitioner's Statement of the Case. Accordingly, SWI submits the following statement of this matter:

The Scioto County Regional Water District ("WATER 1") was created in 1966 to provide water service to portions of a five township area in Eastern Scioto County and has provided service to this area since approximately 1967.[1] The original funding for the service of water by WATER 1 was obtained through FmHA loans in 1967, 1969, and 1973.

In 1969, Scioto Water, Inc. ("SWI") was created as a non-profit corporation with authority to install wells, and maintain and operate a water distribution system to meet the water needs of the residents of Scioto and Pike Counties and the rural areas in proximity thereto. With the knowledge, consent, and even assistance of WATER 1's prior

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[1] Petitioners extended their lines into three additional townships in 1969 - 1970 without obtaining Ohio State Court approval as mandated by Ohio law. On July 19, 1996, however, Water One filed a Petition in the Ohio State Court to amend its service area. this filing occurred well after the commencement of the current action in Federal Court and is still pending. Accordingly, Respondent has counter-claimed contending Petitioner is outside of their service area and is infringing into SWI's protected territory.

management personnel, SWI was similarly funded through loans obtained from the Farmers Home Administration ("FmHA") since the early 1970's.

Since May of 1970, the two water services entities have maintained a contractual relationship with one another and serviced much of the same service areas. Until recently, SWI had never been a water producing entity but rather had purchased its water from WATER 1 and Portsmouth Water (another water association in this same service area) pursuant to contracts with these other agencies. However, SWI has consistently required more water than called for under the contracts in order to serve its customers. In the late 1980's, Water 1 began imposing costly and additional surcharges to the cost of SWI's purchased water. (See SWI's Answer and Counterclaim, Appendix, infra, 1a-28a)

For obvious reasons, SWI began looking at the feasibility of developing its own water source. In the early 1990's, SWI received approval and additional funding from the Farmers Home Administration to develop a wellfield two miles upstream from Water 1's wellfield and to build its own surface water treatment plant. Over the past few years, SWI has entered into loan agreements with the FmHA totalling more than two million dollars to fund this project. The water treatment facility was officially opened in April of 1995 and has operated successfully since then enabling more persons in this rural area to obtain water

service at a more competitive rate. No harm has resulted to Water 1 by virtue of this competitive facility.[2]

Nevertheless, Water 1 has taken the position that it is entitled to protections against impairment pursuant to 7 U.S.C 1926(b) and its progeny by virtue of its status as a former debtor of the FmHA. The problem with Water 1's position arises from its own knowing and voluntary decision back in 1989 to secure a substantial discount of the loans it then owed to the FmHA.

The FmHA, in 1989, instituted the Discount Purchase Program in an attempt to raise funds for this severely indebted federal agency. Debtors to the FmHA were informed by form letters that they could buy out of their FmHa debt at a substantial savings to them, or, in the alternative, could have their loans sold by the FmHA to third party purchasers. (See offering correspondence, Appendix, infra, 35a-54a) This notification from the government specified to current borrowers that if their debt was sold to third-party purchasers, those entities would still have and enjoy the protections of non-impairment provi-

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[2] In fact, Water 1 withdrew its initial filing for a restraining order to prevent the opening of SWI's plant, conceding that it could not demonstrate any harm. (See Plaintiffs' Advisory to Court, Appendix, infra, 29a-34a).

sions of 7 U.S.C. 1926(b). [3] In contrast, then, if the borrowers elected the discount, by refinancing their own debt, they lost those protections.

Water 1 elected in 1989 to take advantage of the substantial discount, and obtained funding from a private source, Star Bank, to have its loans from the FmHA canceled, as paid in full. Once WATER 1 had secured a discount on the amounts it owed the FmHA by refinancing its obligation with non-federal funding sources, it was no longer considered a borrower of the FmHA. WATER 1 has not been so indebted to the FmHA since 1989. In contrast, SWI has continued to be an FmHA-indebted entity since 1971.

## II. PROCEEDINGS BELOW

In 1993, SWI sought and obtained approval from the Ohio Environmental Protection Agency to proceed with its construction plans for a well field and treatment plant. WATER 1 filed several appeals with the Environmental Board of Review in efforts to block the approved construction. The Ohio Environmental Board of Review dismissed

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[3] This continued protection was codified at 7 U.S.C. §1929 (a,g), amended in 1989, as follows:

> . . . 7 U.S.C. §1926(b) shall be applicable to all notes or other obligations sold or intended to be sold under this section. (Emphasis added).

WATER 1's complaint and the Petitioner further appealed that decision. No stay of SWI's construction was granted and the Franklin County Court of Appeals dismissed Water 1's complaint.

Accordingly, when all of these efforts had failed, WATER 1 addressed numerous correspondence to the FmHA advising it that its approval of the funding to SWI was improper. The FmHA respectfully disagreed and since March 27, 1995, the treatment plant of SWI has been fully operational and SWI has been fully indebted to the FmHA for millions of dollars.

It was, therefore, in March of 1995 that WATER 1 sought relief from the United States District Court, Southern District of Ohio, by filing its "Amended Complaint for Temporary Restraining Order, Preliminary Injunction, Permanent Injunction and Mandamus". (Petitioners' Appendix 93a-108a) This Complaint was quickly followed by WATER 1's application for injunction and temporary restraining order against SWI and FmHA. In response, both SWI and the FmHA moved for dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6), asserting that the Complaint failed to state a claim upon which relief could be granted due to WATER 1's lack of standing or entitlement to the protections of 7 U.S.C. §1926(b). Because WATER 1 had filed an application for preliminary injunctive relief, the Trial Court set this matter for a preliminary injunction

hearing which was canceled when Water 1 advised the Court that SWI's projects did not, in fact, threaten its' aquifer or well fields. The sole question remaining was very simply:

> "Can WATER 1 state any claim for relief under 7 U.S.C. §1926(b) (as amended by 7 U.S.C. 1929(a) when it has not been a federally indebted agency since 1989?"

The Trial Judge for the Southern District Court of Ohio agreed with both Respondents herein that WATER 1 was not entitled to the protections of 7 U.S.C. §1926(b) and its amendments. In that Order, the Court below also concluded that WATER 1 failed to state a claim for relief pursuant to various other state and federal claims included within the Complaint.

The Court specifically held that this Order did not dispose of SWI's Counterclaim and application for its own protection pursuant to this same statute. With SWI's Counterclaim remaining before the Southern District of Ohio, WATER 1 filed its Notice of Appeal to the Sixth Circuit Court of Appeals, pursuant to 28 U.S.C. §1292(a)-(1). Although SWI objected to the appellate court's jurisdiction under that statute, the Sixth Circuit overruled the Motion to Dismiss and the case was again fully briefed and argued on the merits.

On December 18, 1996, that Court determined that WATER 1's appeal was without merit and that the District Court had properly entered judgment for SWI on its motion to dismiss for Water 1's failure to state a claim for relief under this statute. This Honorable Court should affirm all of the decisions below by denying the petition for writ of certiorari.

## SUMMARY OF THE ARGUMENT

Water 1 has instituted this action, as well as numerous other actions, aimed at eliminating competition from the non-profit, federally funded water association, SWI. The basis of Water 1's original action in the Southern District of Ohio was that it was entitled to continued protections against competition, or impairment, pursuant to 7 U.S.C. 1926(b). (See Petitioner's Appendix, Complaint, at 93a-125a, specifically 100a-103a). Based upon the prior case law interpreting this statute, the legislative history, the agency interpretation, and the particular facts of this case, the trial court and the Sixth Circuit Court of Appeals properly concluded that Water 1 had lost its once existent rights against curtailment by its own actions. Water 1, in 1989, voluntarily elected to discharge and extinguish its debt with the FmHA, and secure private financing, with resultant benefits and discounts to it. By doing so, Water 1 gave up the rights guaranteed to covered associations under 7 U.S.C. 1926(b), and is no longer able to state a claim for relief against this FmHA indebted association.

## REASONS FOR DENYING THE PETITION

### I. Petitioner is attempting to raise new issues which were not raised before the trial court and are therefore not ripe for appellate review.

Respondent, SWI, is required by Rule 15 of the Rules of this Court to raise any issue or objection to this Court's jurisdiction in the brief in opposition to the petition. SWI respectfully submits that Petitioner's arguments are not properly before this court due to its failure to comply with the basic tenets of appellate procedure that one cannot raise new issues and arguments on appeal which were not presented at the trial level. Bannert v. American Can Co., 525 F.2d 104 (6th Cir. 1975), cert. denied, 426 U.S. 942; U.S. v. Williams, 504 U.S. 36 (1992). As stated in Singleton v. Huff, 428 U.S. 106, (1976), this Court will not consider issues that a party fails to raise in the district court, absent extraordinary circumstances.

Water 1, in its' Appellant's Brief before the Sixth Circuit, raised for the first time a common law "right of first refusal" and engaged in an extensive argument on this issue which had never been advanced by Water 1 in the District Court. The Sixth Circuit Court of Appeals noted, at page 41 of its decision, that there was a question as to whether this argument had been raised below, at the trial level, or waived by Water 1. (See Petitioner's Appendix, 1a-10a). However, the appellate court went on to address

the merits, as did the respondent below. It is respectfully submitted that the petitioner's entire argument is not proper as it was not even asserted before the trial judge, the Honorable Sandra J. Beckwith. This Court wisely refuses to review judgments rendered below where the petitioner raises new issues and arguments that were not presented in the lower courts. Yee v. City of Escondido, 503 U.S. 519, 523-33 (1992). This is such a case and for that reason the writ should be denied.

## II. The decision of the Sixth Circuit Court of Appeals is in complete conformity with the case law and legislative history of 7 U.S.C. §1926(B)

Both the trial court and the Sixth Circuit began their analysis of petitioner's claim under 7 U.S.C. §1926(b) with a review of the history of that statute, its purpose, and the cases interpreting it.

Congress, in the interest of establishing protection to borrowers of the federal government, enacted 7 U.S.C. §1926(b) of the Consolidated Farmers Home Administration Act of 1961. Under that statute, no entity, be it city, county, state, public or private company, can do anything to curtail or limit the water service of an indebted association and lessen its ability to repay a federally funded loan. By virtue of this entire Act, Congress provided a mechanism for rural areas to obtain low interest loans and grants for water facilities who had not previously been considered

good candidates for bank loans. The regulations and policies of this governmental agency set forth terms and conditions upon its loans, all in a clear effort to protect the federal government.

To specifically protect water associations indebted to the FmHA, 7 U.S.C. §1926(b) was enacted, and provides as follows:

> The service provided or made available through any such association shall not be curtailed or limited by the inclusion of the area within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of said loan; nor shall the happening of such event be the basis of requiring such association to secure a franchise or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event. (Emphasis added).

Although this section was adopted and enacted by Congress in the early 1960's, one of the first federal cases to discuss and interpret the Act was Rural Water Dist. No. 3 v. Owasso Utilities Authority, 530 F.Supp. 818 (M.D. Okla. 1979). In reviewing the Act, the Oklahoma District

Court considered the legislative history, the object of the legislation, the method adopted to accomplish that purpose, and the effect of the statute upon those it was intended to protect. Id. at 822-823. Considering all of those factors, which are set forth in detail in the Court's opinion, the Owasso Court specifically held that, "The United States, in the passage of the Agricultural Credit Act, has a paramount interest, not only in the supply of running household water in rural areas, but also for the repayment of funds advanced for the implementation of such systems". Id. at 823. The FmHA indebted water facility was held to be entitled to the protections of §1926(b). Id.

In a series of federal decisions issued in the late 1980's, the Courts were repeatedly faced with situations in which villages or municipalities were expanding and attempting to infringe upon rural areas and water associations protected by §1926(b). City of Madison, Mississippi v. Bear Creek Water Assoc., 816 F.2d 1057 (5th Cir. 1987); Glenpool Utility Services v. Water Dist. No. 2, 861 F.2d 1211 (10th Cir. 1988) cert. denied, 490 U.S. 1067 (1989); Pinehurst Enterprises v. Town of Southern Pine, 690 F.Supp. 444 (M.D.N.C. 1988) affirmed, 887 F.2d 1080 (4th Cir. 1989); Jennings Water, Inc. v. City of North Vernon, 895 F.2d 311 (7th Cir. 1989). In many of these cases, the FmHA was the party which intervened in state actions or private disputes, bringing the matter to federal court, for purposes of protecting its borrowers.

The methods or means by which these municipalities were found to be violative of §1926(b) ranged from annexation to condemnation of the area. However, in each case where a violation of §1926(b) was found, the protected agency was still indebted to the FmHA.

In City of Madison, Mississippi v. Bear Creek Water Assoc., 816 F.2d 1057 (5th Cir. 1987), Bear Creek, a nonprofit corporation similar to SWI, had developed a water system financed by five loans from the FmHA. Id. The indebtedness had originated, as in the case at bar, in the early 70's and continued to the present date. Because the nearby city of Madison had grown and its boundaries now included a part of the area served by Bear Creek, the city instituted eminent domain proceedings to take Bear Creek's water facilities. Id. at 1058. In this logical analysis of §1926(b), the Fifth Circuit Court of Appeals held that the statute herein was unambiguous and clearly established a "bright line rule throughout the FmHA loan term". Id. at 1059.

Subsequently, the Tenth Circuit also agreed with the Fifth Circuit that §1926(b) only protects rural water associations having a continuing indebtedness to the FmHA. Glenpool Utility Services, Id. at 1214. The Tenth Circuit Court of Appeals made it quite clear that the limitations on curtailment or infringement upon a water association, as set

forth in §1926(b), are not permanent or exclusive as WATER 1 would have this Court believe. Quoting from Glenpool:

> It is clear that the protection of §1926(b) is "**a qualified and not an exclusive right. It is a right that is not permanent, but contingent upon the district's outstanding federal debt**." (Emphasis added). Id. at 1216.

More recently in North Alamo Water Supply Corp. v. City of San Juan, Texas, 90 F.3d 910 (5th Cir. 1996), the Fifth Circuit again stated these principles as follows:

> "The service area of a federally indebted water association is sacrosanct. Every federal court to have interpreted § 1926(b) has concluded that the statute should be liberally interpreted to protect FmHA-indebted rural water associations from municipal encroachment." (Emphasis added). Id. at 914.

The question then presented to both of the courts below was whether Water 1 could still be considered to have "outstanding federal debt protections" when it had eliminated its outstanding federal debt.

As set forth in Petitioner's own Amended Complaint, debtors were offered two options by the FmHA. Debtors to the FmHA were informed by a detailed form letter (Appendix, infra, at 35a-54a) that they could refinance their own debt and secure a substantial discount by virtue of the refinancing OR debtors would have their debts sold by the FmHA to a third party purchaser. That form letter specifically advised former debtors that "third party purchasers of the debt from FmHA would be entitled to all of the rights and protections that existed prior to the sale, including the non-impairment provisions of 7 U.S.C. §1926-(b). As stated previously, those continued rights and protections were codified at 7 U.S.C. 1929(a)-(g). (See footnote 3, Id..).

WATER 1 does not dispute that it received notification from FmHA of the foregoing options. Neither does WATER 1 dispute that it elected the alternative of "refinancing its own debt" and thus received a substantial discount. In order to raise the funds necessary to refinance its debt, WATER 1 obtained funding from a private, third party source, Star Bank of Portsmouth.

Petitioner contends that since its notes were "purchased" by Star Bank of Portsmouth, it is still entitled to the protections and "right of first refusal" allegedly contained in Subsection (f) of 7 U.S.C. §1929(a). That subsection, however, refers only to notes sold or intended to be

sold "under this section." The entire section pertains to sales of loans by the FmHA and is focused on who buys the notes. A third party purchase does not cancel the notes if purchased by the issuer, but a refinancing, at a substantial discount, does cancel the notes.

The Courts below did properly look at the entire statutory scheme and found no support for Water 1's piecemeal approach to determining the intent of these provisions. The Courts below also properly considered the application and interpretation of these provisions by the previously cited cases, all of which have limited the protections of the original statute to the life of the loan with the FmHA.

## III. The decision of the Sixth Circuit Court of Appeals does not conflict with the decision of a Colorado state court which is clearly distinguishable on its facts.

Water 1 then attempted to convince both courts below that a Colorado state court decision was binding and persuasive in support of its position.

As part of the Trial Court's detailed analysis and consideration of this Complaint, Judge Beckwith reviewed this then non-final case, produced by WATER 1's counsel, from the Colorado State Supreme Court. While recognizing

that Ute Water Conservacy District v. City of Grand Junction, 900 P.2d 81 (Colo. 1985) has no precedential value in this district, the Trial Court reviewed it in view of the dearth of authorities under §1929a.

In Ute Water, Id., the Colorado State Court did determine that a water district was entitled to protection even after it had purchased its bond from the FmHA. However, the Supreme Court of Colorado specifically found that §1926(b) applied to all notes and bonds sold by the FmHA including those reacquired by the issuer "with the intent not to discharge the instrument". Id. at 92. In reaching this specific and limited determination, the Colorado State Court looked to its version of the Uniform Commercial Code to answer the question of whether a bond is discharged when reacquired by the issuer. Id. at 93. That Court also looked to the "intent of the parties" therein. It specifically relied upon the testimony of bond counsel that the transaction in Ute Water, Id., was "structured" to effectuate an intent to "reacquire the bond without discharging" the underlying debt. Id. at 93. As a review of the transaction in this case will demonstrate, the FmHA simply endorsed the back of the revenue bond and transferred it to the district rather than marking the bond "paid in full", which "would have canceled or discharged the debt". Id.

The Sixth Circuit, also found Ute Water, Id., distinguishable from the case at bar, noting that the state court

relied upon Colorado law permitting a bond issuer to reacquire its own bond without extinguishing the debt. Unlike the loan documents in Ute Water, the loan documents in this case were marked "paid in full." Id. at 42.

If the FmHA had sold WATER 1's notes to a third party, the original loan documents and terms would clearly still be in existence and those terms themselves would dictate the extent and duration of statutory protections. Such notes would clearly be "sold or intended to be sold" as set forth in 7 U.S.C. §1929a(g). Instead, WATER 1's voluntary participation in the discount purchase program resulted in its loans being marked "paid in full" and canceled. If WATER 1's interpretation of §1929a were adopted by this Court, the Courts would further need to determine and create terms for the continued protections being sought herein. Would WATER 1's claimed protection be valid for the length of its debt with Star Bank or would it remain for the original term of the "canceled and paid in full" bonds from the FmHA?

The Courts below did not disregard the word "all" in the language of §1929a(g) as contended by WATER 1. On the other hand, neither did it ignore the words "sold or intended to be sold under this section" as Petitioner would have this Court do. The Courts, to the contrary, used the first rule of statutory construction and read the entire statute, as a whole. The Sixth Circuit concluded that when

an issuer buys back its own loan and cancels the debt, it no longer qualifies for the debtor protections afforded under Section 1926(b). This statutory interpretation is faithful to the main legislative purpose of the statute-safeguarding Farmers Home Administration loans. To rule otherwise and jeopardize the duly granted loans owed by SWI to the FmHA would actually thwart the purpose of the entire statute.

**IV. While the Sixth Circuit Court of Appeals stated that this case created a matter of first impression in the Federal Courts, it did not act without precedent or authority. Its determination is in keeping with the purposes and history of the statute as well as the interpretation given to it by the agency vested with authority to implement § 1926(B).**

The Petitioner, who is seeking to impose a particular statutory construction upon an agency charged with enforcing that statute, carries a heavy burden. As was held in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, at 843 (1984), courts should defer to an interpretation given by the agency charged with its administration so long as the interpretation is based on a permissible construction of the statute and does not frustrate congressional policy.

For instance, in Wayne v. Village of Sebring, 36 F.3d 517 (6th Cir. 1994) cert. denied, 1155 S.Ct. 2000 (1995), the FmHA took the position, consistent with the Plaintiffs' position throughout this case, that the sale of the bond from the FmHA to a third party still continued the terms and conditions of the original loan and entitled the original debtor to the statutory protections. Id. The protections existed because the FmHA had sold the city's bond pursuant to the provisions of the Omnibus Reconciliation Act or § 1929a. Id. at 523.

The Sixth Circuit Court in that case, agreed and "accorded great deference to the FmHA's reasonable interpretation of that statute". Id. at 527, quoting Chevron, USA, Inc. v. Natural Resources Defense Counsel, Inc., 467 U.S. 837 (1984). In the present case, the FmHA has consistently stated that the debt of Water 1 was canceled in 1989 by it's refinancing with private funding sources. Water 1 presented no contrary evidence of an "intent to re-acquire" the bond in this instance, and the Courts below interpreted the statute and ruled in conformity with the interpretation of the Department of Agriculture.

WATER 1 must show that the interpretation embraced by the FmHA clearly contradicts the will of the legislature. Id. WATER 1 has not and cannot meet that burden. It is respectfully submitted that this case presents

an excellent case to apply the principles espoused in Chevron, Id..

In Young v. Community Nutrition Institute, 476 U.S. 974 (1986), this Court followed the Chevron principle and adopted the FDA's interpretation of an ambiguous statutory provision. In Chemical Manufacturer's Association v. Natural Resources Defense Council, 470 U.S. 116 (1985), this Court further affirmed that the view of the agency charged with administering the statute is entitled to considerable deference. As in all the afore-cited cases, the FmHA's interpretation is "sufficiently rational" to preclude a court from substituting its judgment for that of the agency. Chevron, Id..

## V. The present case does not present a case of such special importance as to require this court to grant jurisdiction.

The buy-out scheme presented in this case took place in 1989. The FmHa has consistently applied the interpretation which it gave in this instance to similar situations presented since 1989. Its interpretation is in keeping with the overall purpose of the statute, is consistent with the form letters it sent to former debtors in the late 1980's, and preserves the protections of 1926(b) for the majority of funders; those third party purchasers who were

promised continued protections in the offering letter and the statute.

Water 1 would have this Court believe that the service areas of numerous water districts are threatened by the Sixth Circuit Court of Appeals decision in this case.[4] To the contrary, the decision below upholds and follows well established precedent that protects those water associations who are still indebted to the FmHa from the type of attacks which have been waged against SWI herein by competing, non-protected districts such as Water 1. The integrity and effectiveness of the loan program is only guaranteed if this Court finally puts a stop to the efforts of Water 1, and similar non-protected facilities, to somehow gain rights they have eliminated by their own knowing, informed, and voluntary buy-out of their loans.

Finally, WATER 1 asserts that this question raises an issue of much importance because it is "subject to repeated litigation in numerous different federal and state courts". (Petitioners brief, page 17). It is further stated therein that:

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[4]In fact, even a reversal of the decisions rendered in this case would not determine the issues of the "service area" which were raised by SWI's counterclaim as well as the Petitioners' pending state action to define its service area by amendment of its petition.

> "Petitioner is advised that there are at least two lawsuits pending in the federal and state courts involving in some way the question presented in this Petition." (Petition for Writ, p. 17-18).

Once again, counsel for the Respondent is required to bring to this Court's attention any perceived misrepresentations of fact. Sup. Ct. Rule 15(a). It is respectfully submitted that Counsel for Petitioner is misrepresenting facts to this Court with the above statements.

A simple check of the two cases cited in Footnote 12 of the Petitioner's brief reveals that the only litigation raising this argument is that being pursued by Counsel for the Petitioner, Louis Rosenberg. A review of the pleadings filed in those two pending cases reveals that one does not involve the issue of continued protections after a discount buy-out by a formerly indebted water association. (See Appendix, infra, 55a-58a, Bell Arthur Water Corp. v. Greenville Utilities Commission, City of Greenville, N.C. and Ironwood Development, Inc., No. 4:95-CV-122-H(2) (E.D.E.D. NC), where Atty. Rosenberg pleads that his client therein is still a federally indebted association). The other is currently pending on a summary judgment motion on similar grounds to those raised in this action. (See Appendix, infra, 59a-63a, Rural Water System #1 v. City of Sioux Center, Iowa, Civ. No. C95-4112-MWB (N.D.W.D. IA),

containing portions of the Defendant's motion for summary judgment discussing the within decision).

This Court does not grant writs of certiorari to merely debate matters of intellectual or scholarly interest for the benefit of particular litigants. Rice vs. Sioux City Memorial Park Cemetery, Inc. 349 U.S. 70 (1955). Contrary to Petitioner's assertions, there is no conflict in decisions of the districts below.

The lower courts construed all of the facts in a light most favorable to the non-moving party, in this case, WATER 1, as required by Federal Rule of Civil Procedure 12(b)(6). Even with that analysis, the Court below properly found that there was no set of facts which would permit WATER 1 to recover under its claims pursuant to 7 U.S.C. §1926(b) or §1929a. Mayer v. Mylod, 988 F.2d 635 (6th Cir. 1993). Mann v. Conlin, 22 F.3d 100 (6th Cir. 1994).

Numerous opinions from virtually every circuit in this country have concurred that the purposes of the Agricultural Credit Act are to protect the supply of running water in rural areas and to protect the repayment of funds advanced for the implementation of those systems. Rural Water Dist. No. 3 v. Owasso Utils. Authority, 530 F. Supp. 818 (N.D. Okla. 1979); City of Madison v. Bear Creek, 816 F.2d 1057 (5th Cir. 1987); Glenpool Utility Services v. Creek County Rural Water Dist. No. 2, 861 F.2d 1211 (10th

Cir. 1988) cert. denied, 490 U.S. 1067(1989). Wayne v. Village of Sebring, 36 F.3d 517 (6th Cir., 1994) cert. denied, 1155 S.Ct. 2000 (1995).

All of these cases have found violations of 1926(b) only when the water districts were still indebted to the Farmers Home Administration. As stated in Pinehurst Enterprises, Inc. v. Town of Southern Pines, 690 F.Supp. 444 (M.D.N.C. 1988), aff'd., 887 F.2d 1080 (4th Cir. 1989), the first element of a violation of 1926(b) is limitation of the service provided by a "covered association" and Water 1 is not a covered association. The Sixth Circuit recognized that fact and went on to point out that it was not the Act which altered Water 1's current ineligibility for curtailment protection, it was the discharge, rather than the sale of the debt, by Water 1, that resulted in their loss of continued protections.

It is clear that this case, therefore, does not present a matter of such serious and important concern as to require this Court's exercise of jurisdiction. Maryland vs. Louisiana, 451 U.S. 725 (1981); Wyoming vs. Oklahoma, 502 U.S. 437 (1992).

## CONCLUSION

The Courts below rejected WATER 1's argument that the one time existence of a loan with the FmHA entitled it to an exclusive service area ad infinitum. Water 1's position was not supported by the intent and purpose of the statute, by the agency interpretation of the statute, or by the intent of the parties as evidenced in a loan offering correspondence. The sole authority relied upon by Water 1 in both lower courts was found distinguishable on its facts, non-binding, and non-persuasive as authority.

Petitioner bears a heavy burden to persuade this highest court that this case presents an important issue, requiring a ruling in direct contravention of the purposes and intent of the legislative act. Water 1 has been given a reasonable opportunity below to present all material pertinent to the issues in order to attempt to meet the initial requirement of litigation, i.e., the ability to state a claim upon which relief might be granted.

The Courts below have fairly and exhaustively considered all of those materials and contentions and for all of the foregoing reasons, SWI respectfully requests that this Honorable Court affirm those decisions of the U.S. District Court and the Sixth Circuit Court of Appeals and deny this petition.

Respectfully submitted,

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# APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ADVISORY TO THE COURT AND
SUGGESTION FOR SCHEDULING CONFERENCE

Pages 1a - 28a

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | |
|---|---|
| SCIOTO COUNTY REGIONAL WATER DISTRICT NO. 1., AUTHORITY | :CASE NO. C-1-95-204<br>:<br>:(Rubin, J.) |
| Plaintiff | :(Judge Beckwith, :sitting by designation) |
| v. | : |
| SCIOTO WATER, INC. and RICHARD ROMINGER, Acting Secretary, U.S. Department of Agriculture, Rural Economice and Community Development Service (formerly Farmers Home Administration) | :ANSWER, :COUNTERCLAIM :AND CROSSCLAIM :OF DEFENDANT, :SCIOTO WATER, :INC. |
| Defendants | : |

Comes now Scioto Water, Inc. (hereinafter "SWI"), one of the Defendants herein, by and through counsel, and files its Answer to the Plaintiff's Complaint for temporary

restraining order, injunctive relief and mandamus as follows:

FIRST DEFENSE

The Complaint herein fails to state a claim upon this Defendant upon which relief may be granted and should therefore be dismissed.

SECOND DEFENSE

1. This Defendant admits the jurisdiction of this Court as set forth in Plaintiff's Complaint pursuant to 28 USC §1331, based upon federal question claims. The Defendant does not acknowledge that this Court has subject matter jurisdiction to determine Plaintiff's claim pursuant to 7 USC §1926(b) due to Plaintiff's lack of standing to assert an action under that section.

2. This Defendant denies that Plaintiff's supplemental state law claims are properly before this Court.

3. This Defendant acknowledges that venue is proper in this Court pursuant to 28 USC §1391(a).

4. In response to Plaintiff's Section IV, titled PARTIES, the Defendant admits that SCRWD was created as a regional water district but denies that the Plaintiff is properly existing and operating pursuant to the laws of the

State of Ohio. This Defendant admits the allegations contained in Paragraph 2 of Section IV and states that the allegation contained in Paragraph 3 of Section IV is not applicable to this answering Defendant and therefore requires no response.

5. This Defendant is without sufficient knowledge and information to form a belief as to the truth of the allegations set forth in Paragraphs 1, 2, 4, 8, and 9 of Section V of the Plaintiff's Complaint, titled FACTS and therefore denies same. In addition, to the extent that these paragraphs assert a legal conclusion, this Defendant specifically denies that the law is as set forth by the Plaintiff but states that this Court will make any such determination.

6. This Defendant specifically denies the allegations contained in Paragraphs 3, 7, 11, 12 and 14 of Section V.

7. This Defendant admits the allegations contained in Paragraph 5 to the extent that it sets forth the current water purchase contract by and between the Plaintiff and this Defendant. However, the Defendant specifically denies that the respective roles of the parties are as limited as is set forth in the Plaintiff's Complaint.

8. This Defendant admits the allegations contained in Paragraph 6 of Section V to the extent that it sets forth the surcharge enacted by the Plaintiff upon the Defendant

in 1988. This Defendant further admits that it has continued to pay the surcharge imposed by the Plaintiff but denies that the parties' respective roles are as limited as has been set forth in Plaintiff's Complaint.

9. This Defendant admits the allegations contained in Paragraphs 10 and 13 of Section V of the Plaintiff's Complaint.

10. This Defendant specifically denies all of the allegations contained in Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, and 9 of Section VI of the Plaintiff's Complaint which assert a violation of 7 USC §1926(b). In addition, to the extent that these paragraphs assert legal conclusions, this Defendant states that the Court shall make any such determination on those issues.

11. This Defendant specifically denies the allegations contained in Paragraphs 1 and 2 of Count VII of Plaintiff's Complaint, titled VIOLATION OF ICA.

12. Plaintiff's Paragraph 1, Section VIII, fails to set forth any allegation which requires a response from this Defendant.

13. The Plaintiff's Paragraphs 1 and 2 of Section IX, titled ATTORNEY'S FEES, similarly fails to set forth any basis for a claim against this Defendant but to the

extent that it attempts to, this Defendant specifically denies those allegations.

14. As set forth previously, this Defendant denies that this Court has supplemental jurisdiction over the state law claims as set forth Paragraphs 1 and 2 of Section X of Plaintiff's Complaint.

15. This Defendant specifically denies the allegations contained in Paragraphs 1, 3 and 4 of Section XI of Plaintiff's Complaint.

16. This Defendant affirmatively alleges that to the extent that Paragraph 2 of Section XI asserts a legal conclusion, a Court should make that determination.

17. This Defendant specifically denies the allegations contained in Paragraphs 1, 2, 3, and 4 of Section XII of Plaintiff's Complaint.

## THIRD DEFENSE

The Plaintiff's Complaint herein is barred by Plaintiff's lack of standing or right or capacity to assert this action and therefore should be dismissed.

## FOURTH DEFENSE

Plaintiff's action is barred by lack of subject matter jurisdiction of this Court.

FIFTH DEFENSE

Plaintiff's action is barred by the doctrines of waiver and estoppel.

SIXTH DEFENSE

Plaintiff's claims are barred by its failure to join necessary and/or indispensable parties pursuant to Rule 19 of the Federal Rules of Civil Procedure.

SEVENTH DEFENSE

Plaintiff's acts are ultra vires, or beyond the scope of the power of the Plaintiff association and therefore should be barred.

EIGHTH DEFENSE

Plaintiff's claims are premature as there has been no breach of contract nor any violation of any of the acts alleged in Plaintiff's Complaint by this Defendant.

NINTH DEFENSE

Plaintiff's Complaint is barred by the doctrine of collateral estoppel in that most of Plaintiff's allegations have previously been decided by the proper decision making authority within the State of Ohio and cannot now be relitigated.

## TENTH DEFENSE

Plaintiff's claims are barred by its failure to exhaust administrative remedies.

## ELEVENTH DEFENSE

Plaintiff's claims, if accepted and permitted by this Court, would constitute or result in a violation of the Sherman Antitrust Act (15 USC §1 and 2), the Clayton Act (15 USC §12), and the Valentine Act (ORC 1331), prohibiting anticompetitive and monopolistic conduct.

## TWELFTH DEFENSE

Plaintiff's claims, or some of them, may be barred by the applicable statute of limitations.

## THIRTEENTH DEFENSE

This Defendant reserves the right to supplement its Answer and assert any other affirmative defense to which it may become aware throughout discovery.

WHEREFORE, the Defendant, Scioto Water, Inc., having fully answered, prays this Honorable Court to:

A. Dismiss the Plaintiff's Complaint against it, at Plaintiff's costs;

B. Deny Plaintiff's request for declaratory and/or injunctive relief for the primary reason that Plaintiff has failed to state a claim upon which relief may be granted;

C. Declare that the result of such relief would be to put the parties in the position of violating provisions of 15 USC §12 and/or USC §1 (the Sherman Act and Clayton Acts);

D. Grant attorneys' fees to the Defendant herein, as the successful party pursuant to 28 USC §2412 and 28 USC §2202; and

E. Award any and all other relief to which this Defendant may appear entitled.

## VERIFIED COUNTERCLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF

COMES now Scioto Water, Inc. ("SWI"), one of the Defendants herein, by and through its undersigned counsel, and for its Counterclaim for Declaratory and Injunctive Relief, states as follows:

### I. PRELIMINARY STATEMENT AS TO JURISDICTION AND VENUE

1. This is an action for declaratory and injunctive relief pursuant to Title 28 USC §2201 and §2202 and, in the alternative, Ohio Revised Code Section 2721.02, filed by Defendant, SWI, in order to protect its service area from encroachment or curtailment by Plaintiff, Scioto County Regional Water District No. 1, Authority (hereinafter referred to as "SCRWD") in violation of Title 7 USC §1926(b). This Court has original and supplemental jurisdiction of this cause of action by the Defendant pursuant to Title 28 USC §1331, 1337 and 1367.

2. Venue is proper in this Court pursuant to Title 28 U.S.C. Section 1391.

### II. PARTIES

3. Defendant and Counterclaimant, SWI, is a non-profit corporation existing under the laws of the State of Ohio by virtue of Articles of Incorporation issued on October 10, 1969, and having its principal place of business in Wheelersburg, Scioto County, Ohio.

4. Plaintiff, SCRWD, was originally created pursuant to Ohio Revised Code Chapter 6119 and said Plaintiff is acting as a political subdivision with its principal place of business in Lucasville, Scioto County, Ohio.

5. Defendant, Richard Rominger, is Acting Secretary of the Department of Agriculture, involved in this instance, through the Rural Economic and Community Development Service, formerly Farmers Home Administration, an agency of the United States Department of Agriculture. The department may be served with process by serving its Acting Secretary, Richard Rominger, the Administration Building, Room 200A, 14th Street and Independence Avenue, S.W. Washington, D.C. 20250.

## III. FACTS

6. Scioto Water, Inc., was organized and created in 1969 by a group of residents and property owners in Scioto County, Ohio, to seek a solution to a lack of an adequate domestic water supply in the outlying regions of Scioto County and Pike County and rural areas in proximity

thereto, with those regions lying outside the area served by then existing water lines of SCRWD and the City of Portsmouth.

7. Incorporated on October 10, 1969, SWI is an Ohio not-for-profit water distribution company that has continued to provide domestic water distribution service to residents of Scioto County, Pike County and Jackson County, Ohio since 1969.

8. Pursuant to its Articles of Incorporation, SWI was created and authorized to drill wells, purify, filtrate, buy, sell, and distribute water and to provide the inhabitants of Scioto County, Pike County, and rural areas in proximity thereto with water. The Articles of Incorporation are attached hereto and incorporated herein as **Defendant's Exhibit 1**.

9. From its inception, SWI's construction and expansion of its water distribution system, including the wellfield and water treatment plant, have been financed primarily through a series of secured loans that have been extended periodically by the United States Farmers Home Administration (hereinafter referred to as "FmHA") to SWI, pursuant to the provisions of Title 7 USC §1921, et seq. On January 11, 1974, SWI received loan funds from FmHA for the purpose of financing the construction of SWI's

water distribution system, with said loan funds consisting of the following:

- 40-year loans were granted bearing Loan Nos. 91-01, 91-02, 91-04, 9105, 91-06, 91-07, and 91-09, all in the principal amount of $3,748,000.

Subsequent thereto, SWI has obtained additional loans from FmHA, consisting of the following:

- 35-year loan dated November 7, 1979, bearing Loan No. 91-14 in the principal amount of $305,878.00;

- 40-year loan dated November 13, 1989, bearing Loan No. 91-10 in the amount of $402,000.00;

- 40-year loan dated January 27, 1982, bearing Loan No. 91-15 in the amount of $367,500.00;

- 40-year loan dated March 22, 1984, bearing Loan No. 91-16 in the principal amount of $430,500.00;

- 40-year loan dated June 28, 1988, bearing Loan No. 91-17 in the principal amount of $804,000.00;

- 40-year loan dated May 31, 1994, bearing Loan No. 91-21 in the amount of $2,000,000.00; and

- 40-year loan dated May 31, 1994, bearing Loan No. 91-25 in the principal amount of $500,000.00.

At present, SWI still owes FmHA approximately $7,000,000.00, with the final payment of principal and interest not due until the year 2034. SWI further anticipates applying in the future for additional loans from the FmHA in order to continue its expansion of service to the outlying regions of Scioto County and Pike County, Ohio and the rural areas in proximity thereto.

10. Each of the above FmHA loans was used by SWI to construct new water distribution lines and facilities, and each loan was secured by a mortgage on the real estate owned by SWI and a security interest in all of the water distribution lines and facilities owned by SWI, including those facilities to be built with the proceeds of each of the loans. (See mortgage of SWI and FmHA, attached hereto and incorporated herein as **Defendant's Exhibit 2**).

11. Pursuant to Title 7 USC §1926(a)(3), the application to the FmHA for the water treatment plan and wellfield was submitted, pursuant to Section 1926 to:

> The multi-jurisdictional substate area wide general purpose planning and development agency that has been officially designated as a clearing house agency under Office of Management and Budget Circular A-95 (the "clearing house agency") and to the county or municipal government having jurisdiction over the area in which the proposed project is to be located for review and comment . . . concerning among other considerations, the effect of the project upon the area wide goals and plans of such agency or government. . .

12. On January 6, 1993, the Ohio Valley Regional Development Commission, acting as clearing house agency convened a meeting with SCRWD, SWI, and the City of Portsmouth Water System on the wellfield and water treatment plan project. As a result of this meeting, the clearing house agency approved the project, as evidenced by the attached **Defendant's Exhibit 3**, incorporated herein by reference.

13. As long as SWI remains an FmHA financed water association, pursuant to Title 7 USC §1926(b) the water service provided and made available by SWI may not be:

> . . . curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event by the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the areas served by the association at the time of the occurrence of such event.

14. SWI's initial water distribution system was constructed in 1970 and 1971 and included transmission and distribution lines, storage tanks, and meters with designs based on projections that there would be growth in the number of its customers and in residential and commercial development in the area. This expectation has been supported by the historical development of the system, as SWI services and facilities have expanded from approximately 150 miles of water lines, serving approximately 750 customers in Scioto County and Pike County, to approximately 540 miles of piping and distribution lines, serving

approximately 5,200 customers in Scioto County, Pike County, and Jackson County.

15. Plaintiff, SCRWD, has served as the water provider and seller of water under a contract with Defendant, SWI, said contract being dated May 7, 1970. Defendant, SWI, has historically and continues to be the water purchaser or buyer under said contract with the Plaintiff. The contract and its amendment on August 20, 1981, provides that Defendant, SWI, will purchase a minimum of 5.25 million gallons of water per month from the Plaintiff and a maximum of 10 million gallons per month from the Plaintiff. The current rate for the purchase of said water is 93 cents per thousand gallons. In addition to the 93 cents per thousand gallons, however, the Plaintiff has enacted a surcharge for water usage by SWI for any amounts over the enumerated 1981 maximum of 10 million gallons per month, with the surcharge being the sum of 42 cents per thousand gallons in addition to the base rate of 93 cents per thousand gallons, for a total of $1.35 per thousand gallons over the contract maximum. This surcharge has been unilaterally established by the Plaintiff.

16. In an effort to improve its own facilities and reduce the amount of water it must purchase at wholesale with the overcharge and surcharge assessed by the Plaintiff, SWI initiated a review of alternate water sources in 1990. This review resulted in the decision to construct its own

wellfield and water treatment facility and reduce the amount of water it must purchase at wholesale in order to further expand and more efficiently service its customer base.

17. Plaintiff, SCRWD, was established in portions of a five (5) township area of Scioto County, Ohio by court order of the Scioto County, Ohio, Court of Common Pleas dated November 28, 1966. The unmodified non-exclusive defined area of its district is described in the referenced Court order as follows:

> All of Jefferson Township, Harrison Township, and Madison Township, that portion of Valley Township east of the Scioto River, and that portion of Clay Township extending from and including the unincorporated area known as Twin Valley, north on State Route 139 to the north line of Clay Township and extending from State Route 139 easterly and westerly to serve areas not presently served by the City of Portsmouth. (See attached **Defendant's Exhibit 4**).

18. Historically, SWI and SCRWD have expanded their respective distribution systems and co-existed in Scioto County without a great deal of conflict between the two. The two entities have served adjoining but totally separate service areas within Scioto County with the knowledge and

acquiescence of SCRWD as reflected in the Plaintiff's water service map of 1978, attached hereto as **Defendant's Exhibit 5**.

19. SWI has received its operational permit from the Ohio Environmental Protection Agency and all other necessary approvals to commence its operation of its newly constructed wellfield and water treatment plant, with the operation of said wellfield and treatment plant commencing on or about March 30, 1995. Through the operation of its wellfield and water treatment plant, SWI has not served, does not serve, and does not intend to serve customers currently served by SCRWD.

## COUNT I

20. Defendant, SWI, incorporates by reference as if fully rewritten herein, all of the allegations and averments set forth above.

21. Defendant, SWI, is an FmHA indebted water association and is therefore entitled to the protections afforded FmHA borrowers against impairment and infringement of its service area pursuant to 7 U.S.C. Section 1926(b).

22. Plaintiff SCRWD's initiation of the above-styled action through the filing of its Complaint, Request for Preliminary Injunctive Relief, and Temporary Restrain-

ing Order, are all activities which are in violation of 7 USC §1926(b) and which operate to the prejudice and irreparable injury of Defendant, SWI. In the event that the Plaintiff's Motion for Preliminary Injunctive Relief or Temporary Restraining Order is granted, SWI will suffer curtailment and impairment of its ability to repay its FmHA indebtedness. (See Affidavit of Donald Spradlin, **Defendant's Exhibit 6**).

23. In the event that the Plaintiff's Motion for Preliminary Injunctive Relief or Temporary Restraining Order is granted, or in the event the Plaintiff prevails on its Complaint, Defendant, SWI, an FmHA borrower, will be unable to service the FmHA and OEPA approved outlying regions of Scioto, Pike and Jackson County, Ohio.

24. The Petition and Plan of Operation for Plaintiff, SCRWD, approved by the Scioto County, Ohio, Court of Common Pleas specifically limited the territory of SCRWD to portions of a five township area in Scioto County, being the Townships of Jefferson, Harrison, Madison, Valley, and Clay.

25. Without approval of the Scioto County, Ohio, Court of Common Pleas, without statutory authority, and in direct violation of Ohio Revised Code §6119.05 and 6119.051, Plaintiff, SCRWD, has expanded and extended its water lines and water distribution facilities into the Town-

ships of Porter, Bloom and Vernon. This expansion and intrusion is evidenced by the Plaintiff's own pleadings and admissions, as well as the service area map of the Plaintiff issued in 1978 and attached hereto as **Defendant's Exhibit 5**.

26. The Townships of Vernon, Bloom and Porter, located within Scioto County, Ohio, are townships clearly within the service area of SWI, an FmHA indebted water association, as described in the Articles of Incorporation of SWI and are further clearly outside the established water district of the Plaintiff.

27. The extension and expansion of SCRWD into the Townships of Porter, Bloom and Vernon within Scioto County, Ohio are intrusions into the service area of SWI, in violation of 7 USC §1926(b). Said intrusions curtail and limit the service area of SWI and consequently, have curtailed and limited the ability of SWI to repay its existing FmHA indebtedness.

28. Plaintiff, SCRWD, acting through its authorized agents, has engaged in vigorous activities and efforts to interfere with, terminate, and impede the plans of SWI to construct its own wellfield and water treatment plant, including numerous correspondences to FmHA officials on a regional, state and federal level, with state clearing house officials, township trustees, and various other governmental

agencies, state and federal legislators and the Environmental Protection Agency. In addition, the Plaintiff has filed appeals to the Environmental Protection Agency, Ohio Valley Regional Development Commission, Environmental Board of Review, and the Franklin County Court of Appeals, all in an effort to defeat the plans of SWI to develop its own water producing capability.

29. The efforts of the Plaintiff, SCRWD, as above-described, are motivated by SCRWD's desire to retain SWI as its second largest bulk water purchaser.

30. SCRWD has engaged in activities as above--described, which are clearly intended to curtail and impair the ability of SWI to service its customers and to reduce its water rates for its current customers and projected future customers. The actions of SCRWD have consequently curtailed and impaired SWI's ability to repay its current FmHA indebtedness.

## COUNT TWO

31. Defendant, SWI, incorporates by reference as if fully rewritten herein all of the allegations and averments set forth above.

32. Defendant, SWI, contends that the Plaintiff has engaged in anti-competitive and monopolistic conduct in direct violation of 15 USC §1 and §2.

**COUNT THREE**

33. Defendant, SWI, incorporates by reference as if fully rewritten herein, all of the allegations and averments set forth above.

34. Defendant asserts that Plaintiff, acting through its authorized agents, has maliciously and tortiously interfered with the contract relationship between Defendant, SWI, and FmHA and has engaged in activities specifically designed to encourage or create a breach of said contract relationship between SWI and FmHA.

35. Defendant asserts that Plaintiff, acting through its authorized agents, has authored and forwarded numerous correspondences to various agencies, including Defendant, U. S. Department of Agriculture, seeking the withholding of committed funds for the construction project of Defendant, SWI, and encouraging and fostering a breach of the contract between Defendant, SWI, and Defendant, FmHA, as evidenced by the attached exhibits.

IV. ATTORNEYS' FEES

36. As a result of the conduct of the Plaintiff, SWI has found it necessary to retain the services of counsel.

37. Upon final trial or decision in this action, Defendant, SWI, seeks recovery of its attorneys' fees and costs pursuant to the Declaratory Judgment Act, 28 USC §2201 and Equal Access to Justice Act, 28 USC §2412.

WHEREFORE, Defendant, Scioto Water, Inc., requests that the Court issue a declaration and judgment pursuant to the Federal Declaratory Judgment Act as follows:

A. That the Defendant, SWI, is currently indebted to FmHA and is entitled to the protections against impairment or infringement upon its service area, pursuant to 7 USC §1926(b);

B. That the construction and operation of the wellfield and water treatment facility by Defendant, SWI, in Valley Township, Scioto County, Ohio, is protected from curtailment by the Plaintiff pursuant to 7 USC §1926(b);

C. That the Plaintiff, SCRWD, is not currently indebted to FmHA and is not entitled to the protections afforded to FmHA borrowers under 7 USC §1926(b);

D. That the Court declare that Defendant, SWI, has the right to provide water service to new customers which are currently unserved by any other water entity, including

the Plaintiff, and which are included within the FmHA and Ohio Environmental Protection Agency plans for Phase I and Phase II of the water distribution project.

E. That Plaintiff, SCRWD, its agents and employees and anyone acting under their direction be preliminarily and permanently enjoined from interfering with the operation of the wellfield and water treatment plant constructed by the Defendant, SWI.

F. That SCRWD be similarly enjoined from interfering with any contract between SWI and FmHA.

G. That SCRWD be similarly enjoined from continuing its intrusion into the service area of SWI and from providing water service outside its court created water district; and

H. That SCRWD be ordered to transfer, convey and deed its transmission lines and properties located within the Townships of Porter, Vernon and Blume in Scioto County, Ohio to Defendant, SWI, as said transmission lines and facilities lie outside the court created water district.

I. That Defendant, SWI, be awarded its reasonable expenses incurred in this action, including costs and attorneys' fees, and any and all other relief to which Defendant, SWI, may be entitled at equity or law.

## CROSS CLAIM AGAINST DEFENDANT, RICHARD ROMINGER,THROUGH THE RURAL ECONOMIC AND COMMUNITY DEVELOPMENT SERVICE FORMERLY KNOWN AS THE FARMERS HOME ADMINISTRATION

Comes now the Defendant, Scioto Water, Inc., by and through counsel, and for its Cross Claim against the Defendant, FmHA, states as follows:

1. Defendant, SWI, incorporates by reference as if fully rewritten herein, all of the allegations and averments set forth above.

2. That the Plaintiff, SCRWD, has filed a Complaint against both SWI and FmHA, asserting that SWI has violated 7 USC §1926(b), by virtue of its expansion and construction of its own water wellfields in the rural portions of Scioto and Pike Counties.

3. That if the Plaintiff should recover a judgment against this Defendant, which this Defendant affirmatively denies, then the Defendant, SWI, is entitled to a judgment against the Defendant, FmHA, for indemnification and/or contribution in full, including attorneys' fees and court costs for all sums which this Defendant could be adjudged liable to the Plaintiff.

WHEREFORE, the Defendant, Scioto Water, Inc., prays as follows:

A. That the Complaint against it be dismissed;

B. For recovery on its Counterclaim against the Plaintiff;

C. In the alternative, for recovery on its Cross Claim against FmHA;

D. For its costs herein expended, including attorneys' fees; and

E. For any and all other relief to which this Defendant may appear entitled.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was this ____ day of May, 1995, served by first class mail, postage prepaid upon the following:

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San Antonio, Texas 78205

Edmund A. Sargass, Jr., Esq.
James M. Coombe, Esq.
U.S. Attorney's Office
220 U.S. Post Office Courthouse
100 East Fifth Street
Cincinnati, OH 45202

Hon. Janet Reno
U.S. Attorney General
Department of Justice
10th and Constitution Ave., N.W.
Room 511
Washington, D.C. 20053

SUSANNE M. CETRULO

# APPENDIX II

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

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ADVISORY TO THE COURT AND
SUGGESTION FOR SCHEDULING CONFERENCE

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Pages 29a - 34a

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | | |
|---|---|---|
| SCIOTO COUNTY | § | CASE NO |
| REGIONAL WATER | § | C-1-95-204 |
| DISTRICT NO.1 | § | (Beckwith, J.) |
| AUTHORITY | § | |
| | § | |
| Plaintiff | § | |
| vs. | § | ADVISORY TO THE |
| | § | COURT AND |
| SCIOTO WATER, INC. | § | SUGGESTION FOR |
| | § | SCHEDULING |
| Defendant | § | CONFERENCE |
| and | § | |
| | § | |
| DANIEL R. GLICKMAN | § | |
| Secretary US Dept. | § | |
| of Agriculture, | § | |
| Rural Economic and | § | |
| Community Development | § | |
| Service (formerly | § | |
| Farmers Home | § | |
| Administration) | § | |
| | § | |
| Defendant | § | |

COMES NOW the Plaintiff, Scioto County Regional Water District No. 1, Authority ("WATER 1"), by and through counsel, and advises this Court of the lack of necessity of going forward with the hearing on Plaintiff's Application for Preliminary Injunctive Relief on August 14, 1995 and suggests the Court hold a scheduling conference between the Court and counsel.

I.

1. Plaintiff advises the Court that because of information developed during recent discovery depositions, it is not necessary or appropriate to proceed with the hearing on August 14, 1995, on Plaintiff's Application for Preliminary Injunction.

2. July 10 and July 12 depositions of Bill Peak and Wayne Cannon, U.S. Department of Agriculture, Rural Economic and Community Development Service ("RECDS-") (formerly Farmers Home Administration) disclosed that Scioto Water, Inc.'s treatment facility was built to produce only 1,000,000 gallons per day. Before redesign, necessitated by cost overruns, the facility was designed to produce 2,000,000 gallons per day and, this was illustrated by previously available Farmers Home Administration documentation. Under present treatment plant capacity limitations, the level of production of one million gallons per day

does not immediately threaten the Plaintiff's aquifer and its wellfield capacity.

3. Phase II of SWI's project presently is under review at the RECDS. Until SWI proposes and RECDS agrees to review application for increased capacity of the 1,000,000 gallons per day water treatment plant, or increased wellfield usage, immediate injury to Plaintiff is more distant.

4. In candor, Plaintiff reports to the Court, in light of these facts, the Plaintiff is not likely to establish immediate harm as a required element to justify preliminary relief. As a consequence, the Plaintiff's requested hearing date, now set for August 14, 1995, should be relinquished to the Court's use for more pressing matters.

**II.**

1. Additionally, as Plaintiff has previously stated within written pleadings previously filed, it is preparing two (2) separate motions for summary judgment for which July 10 and July 12 deposition testimony is necessarily required. These Fed. R. Civ. P. § 56(c) motions are to be filed upon receipt of the July 10 and 12 deposition transcriptions.

2. Finally, as the Court is well aware, there are now substantive motions presently pending before the Court. A

resolution of these and the additional motions will serve to narrow the issues that may require a later hearing, and trial and, in the meantime, encourage resolution of the issues by settlement. Plaintiff concurs with a suggestion previously twice made in conference with the Court by counsel for FmHA that the Court consider the substantive motions before proceeding with the further hearing to simplify the proceeding and reduce the costs of further case development, including preparation and presentation of live witnesses.

III.

For the above reasons, Plaintiff advises the Court that the hearing scheduled for August 14, 1995 to consider Plaintiff's Application for preliminary Injunction is no longer required. However, Plaintiff respectfully suggests to the Court consideration of a scheduling conference in the interest of judicial economy and minimizing expense to the parties.

WHEREFORE PREMISES CONSIDERED Plaintiff prays the Court, upon consultation with parties, consider a scheduling conference to address the issues set forth herein.

Respectfully submitted,

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Schroeder, Maundrell,
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TRIAL ATTORNEY FOR
PLAINTIFF
SCIOTO COUNTY REGIONAL
WATER DISTRICT NO. 1

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San Antonio, Texas 78205

TRIAL ATTORNEY FOR
PLAINTIFF
SCIOTO COUNTY REGIONAL
WATER DISTRICT NO. 1

## CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been served upon the following by regular mail on this the 20th day of July, 1995.

Stephen L. Mowery, Esq.
Mowery, Brown and Blume
Attorneys at Law
8595 Ohio River Road
Wheelersburg, Ohio 45694
Attorney for Scioto Water, Inc.

Susanne M. Cetrulo, Esq.
Attorney at Law
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Cincinnati, OH 45202
Attorney for U.S. Dept. of Agriculture

---

LOUIS T. ROSENBERG

# APPENDIX III

**UNITED STATES DISTRICT COURT**
**FOR THE**
**SOUTHERN DISTRICT OF OHIO**
**WESTERN DIVISION**

**ADVISORY TO THE COURT AND**
**SUGGESTION FOR SCHEDULING CONFERENCE**
**(JA, VOL. II, EX. 9)**

**Pages 35a - 54a**

IMPORTANT INFORMATION CONCERNING YOUR OPPORTUNITY TO PREPAY FARMERS HOME ADMINISTRATION LOAN AT A DISCOUNT

PLEASE READ CAREFULLY

January 10, 1989

Dear Community Programs Borrower:

Farmers Home Administration (FmHA) is please to announce a Discount Purchase Program (DPP) for 1989. FmHa is required by law to sell sufficient Community Programs loans to realize net proceeds in Fiscal Year (FY) 1989 of $584 million. FmHA intends to raise this amount by first offering Community Programs Borrowers an opportunity to purchase their FmHA loans at a discount, subject to certain conditions and restrictions. The attached Discount Purchase Program Description provides more specific information about the program. If the DPP fails to produce the total amount of proceeds required, FmHA plans to conduct some type of third party loan sale.

If you purchase your loans between January 10, 1989, and March 9, 1989, no deposit is required. If you want to purchase your loan between March 10, 1989, and May 9, 1989, a Good Faith Deposit of 5 percent of the outstanding

loan balance must be received in the FmHA District Office by March 9, 1989. Good Faith Deposits received in the District Office after march 9, 1989, will not be processed and will be returned to the borrower. The deadline for purchasing your loan under this program is May 9, 1989.

Potential advantages of participating in the Discount Purchase Program include:

1. Buying your loans at a discounted price may result in saving your community money. Normally, FmHA only permits redemption of loans at the full outstanding balance (par).

2. You avoid the future possibility of FmHA requiring you to refinance (graduate) your loans at par.

3. Purchase of your loans will free you of certain financial and audit reporting requirements contained in the loan documents.

4. Only funds in excess of the current reserve requirements may be used for the Good Faith Deposit. However, monies that relate strictly to the loans being purchased that you may already have in escrow or reserve funds may be used to complete the purchase of your loans. For example, if you

have any funds in low-yielding accounts and investments, these funds could be used to retire your loans at a potentially favorable price.

Community Programs Borrower

5. Purchase of loans does not preclude you from obtaining future loans from FmHA, providing you meet FmHA eligibility requirements.

You are urged to undertake a careful financial analysis before deciding to prepay. Depending on the terms of your particularly loan(s), the terms of any new financing required plus the transaction fees and costs may outweigh the potential benefits from the Discount Purchase Program. Therefore, we strongly encourage any borrower considering a purchase to consult with its financial advisors before proceeding.

A system of Pricing Grids will be used to determine the price of each loan. The Grids are based on a standard present value calculation using a number of uniform assumptions. Therefore, a present value calculation of the cash flow of your particular loan may vary from the price offered by FmHA if the characteristics of your loan are different from the assumptions used in the Grids. However, a price based on the Pricing Grids constitutes FmHA's offer and will be utilized, without exception, for all borrowers

who purchase their loans at a discount in this year's program.

A detailed explanation of how to use the Pricing Grids is enclosed. The Pricing Grids included with this letter are provided so that you may estimate your discount. Actual final pricing information will be available to you through your FmHA District Office.

As we indicated, depending on the level of interest in the Discount Purchase Program, FmHA may need to conduct a third party sale later this year. You should be reassured that in the event your loan is sold, the legislation mandating the sales affords a number of important protections. The terms and conditions of the loans will not change, except that the new holder cannot require a current borrower to refinance (graduate) its loan in the private sector (something FmHA can do if it continues to hold the loan). Borrowers will have essentially the same rights, privileges, and obligations after the sale and the sale program does not change a borrower's eligibility to borrow from FmHA in the future.

We hope that this overview of FmHA loan sale programs is helpful to you and we look forward to working with you in the future.

Sincerely,

LA VERNE AUSMAN
Acting Administrator

Enclosures

ATTACHMENT A

FmHA DISCOUNT PURCHASE PROGRAM
DESCRIPTIO

The Farmers Home Administration's (FmHA) Discount Purchase Program (DPP) provides most Community Programs borrowers the opportunity to buy back one or more of their loans at a potentially attractive discount price.

I. ELIGIBILITY/RESTRICTIONS

1. Only Water and Waste Disposal and Community Facilities loans may be purchased at a discount.

2. If a loan is delinquent, the amount delinquent must be paid off at par at the time the loan is purchased PRIOR to any discount being applied to the remaining balance. For the purposes of the DPP, a loan is considered delinquent whenever a scheduled pay-

ment (as determined by the debt instrument) is not received by FmHA on or before the due date.

3. Borrows MAY NOT purchase a loan at a discount if they were asked to refinance (graduate) that loan at par in a letter dated on or before December 30, 1988. Borrowers MAY purchase one or more of its other loans. borrowers who receive a request to graduate will be given the right to appeal the decision if they have not previously been given that right. If the appeal results in a reversal of the request to graduate, a borrower would then be granted an extension of timeframes and conditions as described in this DPP package. Borrowers will be notified in writing by the District Office of their right to appeal the graduation decision, along with instructions outlining the procedures to be used should they decide to appeal.

4. ALL loan funds (NOT grant funds) must be fully disbursed by the FmHA Finance Office by December 27, 1988. The only exception to this will be in cases where FmHA loan funds have been set aside to fund the interest due during an interest-only period. In these cases, the loan may be purchased provided the following are accomplished prior to calculation of the discounted price of the loan:

a. Funds for payment of interest not advanced by the Finance Office are cancelled.

b. Funds for payment of interest advanced by FmHA and held by the borrower should be applied to interest accrued through the date of the DPP closing and the balance to the unpaid principal on the loan.

5. ALL of the following conditions must be met by the date of purchase:

a. All loan AND grant funds must be fully advanced to and disbursed by the borrower to pay eligible project costs or have been returned to FmHA or have been cancelled prior to final payoff.

b. The loan is evidenced by a PERMANENT DEBT INSTRUMENT.

c. The project is in operation.

d. FmHA's final inspection is completed.

e. The consulting engineer's/architect's certificate of final completion has been issued.

f. The borrower has provided written acceptance of the facility.

5. BONDS, NOTES OR OTHER OBLIGATIONS WILL NOT BE SOLD OR ASSIGN TO THIRD PARTIES UNDER THE DPP. Loans will only be sold directly to borrowers and any loan purchased at a discount will be stamped "Satisfied in Full."

6. A borrower may use existing funds, newly incurred debt, (either tax-exempt debt or non-tax-exempt debt), or any combination of the above to purchase a single loan. If any combination of tax-exempt funds and non-tax-exempt funds are used to purchase a single loan, the loan will be priced on the basis of the tax-exempt formula, as described below.

7. Borrowers may use bond escrow accounts, such as reserve, extension and improvement, redemption and others that are strictly related to the loan being purchased, to purchase the loan. If a borrower purchases only some of its loans, it MAY NOT use reserves required for the loans not purchased.

Only funds in EXCESS of the current funded reserve requirements specified in the loan security instruments may be used for the good faith deposit. any other available funding source, including any

amount of reserves in excess of those currently required in the security instruments, may be used for the Good Faith Deposit.

8. A borrower may purchase any one or more of its eligible loans. Loan obligations which have been assigned separate loan numbers but are evidenced by one debt instrument, will be treated as one loan and may not be purchased separately by a borrower. A separate pricing calculation, "Indication of Interest," and "Borrower Final Price Acceptance Form" are still required for each individual loan number evidenced by the one debt instrument. Borrowers should contact the FmHA District Office servicing the account if assistance is needed to identify the affected accounts.

## II. HOW TO PARTICIPATE

Borrowers may choose to purchase their loan at a discount at any time through May 9, 1989, based on the formulas and criteria described below.

1. Borrowers who want to purchase their loans at a discount on or before March 9, 1989, may do so without making a Good Faith Deposit simply by contacting their District Office to obtain a final price and schedule a closing date.

2. Borrowers who desire to complete the purchase after March 9, 1989, must follow the instructions below:

a. Complete the enclosed "Indication of Interest" form (one for each loan to be purchased) and send it, along with a Good Faith Deposit equal to five percent of the outstanding principal balance of each of the loans to be purchased, to the FmHA District Office. This information must arrive at the District Office by CLOSE OF BUSINESS, March 9, 1989. Indications of Interest and deposits not received by then will be returned to the borrower.

b. Loan purchases may be scheduled for any date mutually agreed to by the borrower and the District Office. Except as described in I.3., above, all closings must occur on or before May 9, 1989. Borrowers must contact their District Office to obtain the final purchase price.

c. If the borrower fails to complete the loan purchase by May 9, 1989, the Good Faith Deposit will be processed as an "extra" loan payment and applied to the FINAL loan installment(s), unless the FmHA servicing

official determines that it should be applied as a regular payment in order to prevent a delinquency from occurring or for some other justifiable reason. When the Good Faith Deposit is applied to the final loan installment, the next regular payment will still be due as scheduled.

d. At the time of final payoff, the borrower will be required to sign a Borrower Final Price Acceptance Form indicating acceptance of the price (See Attachment C).

## III. DETERMINING THE METHOD OF FINANCING

The type of financing used to purchase a loan is the primary factor in determining the price of the loan. A borrower may use either tax-exempt funds or non-tax-exempt funds, each of which will result in a different discount. It is the SOURCE of the funds that determine whether they are tax-exempt or not.

1. Tax-exempt funds are funds that have been derived (or will be derived), directly or indirectly, from borrowings the income on which is excludable from gross income under the Internal Revenue Code. For instance, if a borrower has on hand unused funds

remaining from a previous tax-exempt bond issue, those funds are considered tax-exempt.

The discount price of a loan that is purchased with tax-exempt funds is based on the Schedule of Certified Interest Rates, as published by the Secretary of the Treasury, without any adjustment.

2. Non-tax-exempt funds are basically any type of funds other than tax-exempt. This would include existing funds on hand that were accumulated through normal operations (systems revenues or special assessments) even if the borrower is a public body that normally issues tax-exempt debt.

The discount price of a loan that is purchased with non-tax-exempt funds is based on the price FmHA received on the loans it sold in the most recent securitized sale, adjusted for changes in the market interest rates, servicing and sales expenses, and the maturity and interest rate of the loan to be purchased.

Non-tax-exempt financing results in a higher discount to borrowers and lower price to FmHA. Because of that, all borrowers purchasing loans with non-tax-exempt funds (including funds on hand and

new debt), must agree never to replace those funds or refinance that debt with tax-exempt financing.

A borrower may use existing funds, newly incurred debt (either tax-exempt or non-tax-exempt), or any combination of the above to purchase a single loan. However, if any tax-exempt funds are used, the loan will be priced as if all the funds are tax-exempt.

Borrowers should consult with a financial advisor to determine which method of financing would be better. They should also seek legal counsel if they have any questions as to whether the source of the funds to be used to purchase a loan is tax-exempt or not.

## IV. DETERMINING THE DISCOUNT PRICE

The price of each eligible loan must be calculated separately. The Pricing Factor obtained from the Pricing Grid determines the discount that will be taken on the unpaid principal of each loan. The Pricing Factor is based on the method of financing used (discussed above), whether the debt instrument associated with the loan to be purchased requires annual payments or not, the interest rate of the loan, and the final maturity of the loan.

Enclosed is a copy of the Pricing Grids that will be used to determine the Pricing Factors on all loans purchased between January 10, 1989, and February 9, 1989. FmHA will produce a ne set of Pricing Grids each month, based on new Treasury rates, that will determine new pricing Factors for closings in each of the remaining three months of the program as follows:

| TREASURY RATES EFFECTIVE | CLOSING DATES |
|---|---|
| January 1, 1989 | January 10 - February 9,1989 |
| February 1, 1989 | February 10 -March 9, 1989 |
| March 1, 1989 | March 10 - April 9, 1989 |
| April 1, 1989 | April 10 - May 9, 1989 |

New Pricing Grids based on rates for February through April will be available at the District Offices.

In planning the timing of their discount purchase, borrowers should remember that the Pricing Factors will change as interest rates change. If interest rates decline, the price will be higher (smaller discount); if the interest rates increase, the price will be lower (larger discount).

## V. USING THE PRICING GRIDS

The following steps must be followed for each loan separately.

1. Select the Pricing Grid to use. There are four separate Pricing Grids. The one to use for a loan depends on the method of financing chose (tax-exempt or non-tax-exempt) and the payment frequency of interest payments (annual or other than annual) required by the debt instrument. The following matrix will help you select the correct Pricing Grid to use:

| | PAYMENT FREQUENCY | |
|---|---|---|
| TYPE OF FINANCING | ANNUAL | OTHER |
| TAX-EXEMPT | GRID A | GRID B |
| NON-TAX-EXEMPT | GRID C | GRID D |

(For example, if the loan requires semiannual, quarterly or monthly payments of interest, use Grid B or D.)

2. Determine the Final Maturity Date of the loan. This will depend on whether the loan is an AMORTIZED

loan (which requires level payments) or a PRINCIPAL PLUS loan (which requires a specified principal payment and interest on the outstanding balance).

a. Amortized Loans - The Final Maturity Date is the final regular installment due date specified int eh debt instrument.

b. Principal Plus Loans - The Final Maturity Date is the final scheduled principal installment due date that remains unpaid. If there have been extra payments applied against the end of the loan, the Final Maturity Date used to determine the Pricing Factor may be earlier than the original final scheduled installment due date.

3. Determine the Pricing Grid Maturity Date. The Pricing Grid only shows Maturity Dates of April 1 and October 1 of each year. If the Final Maturity Date matches the Pricing Grid Maturity Date, use that date. Otherwise, use the April 1, or October 1 date FOLLOWING the Final Maturity Date of the loan, as determined in Item 2 above.

4. Find on the selected Pricing Grid the Interest Rate of the loan being purchased. The Interest Rates are

listed across the top of each column. If the exact Interest Rate of a loan is not shown, use the next highest rate.

NOTE: On loans for which an Administrative Interest Rate Adjustment has been processed, the interest rate is the adjusted interest rate NOT the original interest rate stated in the debt instrument. Questions on this subject may be answered by contacting the FmHA District Office servicing the account.

5. Determine the Pricing Factor. The Pricing Factor is the decimal number that appears at the intersection of the column of the appropriate Interest Rate and the row of the appropriate Maturity Date.

NOTE: Some loans with relatively high interest rates and short terms to maturity will show a pricing factor of 1.00000. this means that no discount will apply to the purchase of this loan.

The Pricing Grids are provided only for the purpose of determining the Pricing Factor used in calculating the discount associated with the unpaid principal of each loan. The Pricing Factor IS NOT the final payoff amount. Other adjustments, such as accrued interest, delinquencies and payments in process, will effect the amount owed FmHA.

THE FINAL PAYOFF AMOUNT WILL BE DETERMINED BY THE DISTRICT OFFICE BASED ON THE STATUS OF THE LOAN ACCOUNT AS OF THE DATE OF PURCHASE. The District Office will use the Borrower Final Price Acceptance Form (see Attachment C) to calculate the final payoff amount. The borrower will have the opportunity to review the calculation and must agree to it before the loan can be purchased.

## VI. SPECIAL CONSIDERATIONS

Generally, it will benefit a borrower to purchase its loan(s) if the total costs of the refinancing, including the new debt service, are less than the costs associated with the original loan.

The benefits of participating in the program will vary from borrower to borrower and from loan to loan. Any final decision to purchase a loan should be based on the following:

1. The purchase discount rate (which will depend on the method of financing, tax-exempt or non-tax-exempt, selected by the borrower),

2. Market interest rates at the time of purchase,

3. The total cost of raising the funds to purchase the loan,

4. The terms of any new debt required (there may be instances where the refinancing could be for a shorter maturity period or a higher interest rate that would increase debt service payments, possibly resulting in a rate or fee increase for users),

5. The consequences of failing to purchase the loan after submitting a Good Faith Deposit (since the Deposit is applied as an EXTRA payment, the next regular payment would still be due as scheduled, possibly creating cash flow problems for the borrower), and

6. A recent change in the tax law which may make participation in the program more attractive for certain nonprofit associates (consult a tax advisor for details).

In order to determine whether it is beneficial to participate in the DPP, FmHA strongly urges borrowers to consult with a qualified financial advisor before submitting a Good Faith Deposit.

VII. INQUIRIES

Borrowers and District Offices may obtain answers to any questions concerning the Discount Purchase Program by calling toll-free 1-800-666-7318 for assistance, between 8:30 a.m. and 4:30 p.m. (Central Time). This service will be available from January 10, 1989, through March 10, 1989. Thereafter, address questions to the FmHA District Office.

# APPENDIX IV

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NORTH CAROLINA
GREENVILLE DIVISION

BELL ARTHUR WATER CORPORATION'S
MEMORANDUM IN SUPPORT OF ITS MOTION
FOR 7 U.S.C. §1926(B)
SUMMARY JUDGMENT ON LIABILITY
PURSUANT TO FED. R. CIV. P. 56(A)

(BESS ARTHUR WATER CORP. V. GREENVILLE, N.C. AND
IRONWOOD DEVELOPMENT, INC.,
NO. 4:95-CV-122-H(2)(E.D.E.D. NC)

Pages 55a - 57a

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA EASTERN
DIVISION AT GREENVILLE, NORTH CAROLINA

| | |
|---|---|
| BELL ARTHUR WATER CORPORATION, | )<br>)<br>)NO. 4:95-CV-122-H(2)<br>) |
| Plaintiff | )BELL ARTHUR WATER<br>)CORPORATION'S<br>)MEMORANDUM IN |
| vs. | )SUPPORT<br>)OF ITS MOTION FOR |
| GREENVILLE UTILITIES COMMISSION, CITY GREENVILLE, N.C. and IRONWOOD DEVELOPMENT | )7 U.S.C. § 1926(b)<br>)SUMMARY JUDGMENT ON<br>)LIABILITY PURSUANT TO<br>)FED. R. CIV. P. 56(a)<br>)<br>) |
| Defendants. | ) |

NOW COMES Bell Arthur Water Corporation ("BAWC"), Plaintiff, by and through counsel, and files BAWC's Memorandum in Support of BAWC's Motion for 7 U.S.C. § 1926(b) Summary Judgment On Liability

Pursuant to Fed. R. Civ. P. 56(a) against Defendants Greenville Utilities Commission ("GUC"), the City of Greenville ("the City") and Ironwood Development, Inc. ("Developer"). BAWC asserts the U.S. Government's position in this case is supportive of such relief for reasons set forth below.

**RULE 10(c) INCLUSION BY REFERENCE**

Plaintiff includes by reference pursuant to Rule 10(c), its factual allegations of its:

1. BAWC'S First Amended Verified Complaint for Declaratory Judgment and Permanent Injunction (Docket No. 50);

2. BAWC'S Application for Preliminary Injunction Pursuant to F.R.C.P. 65 Against Defendants Greenville Utilities Commission and the City of Greenville, N.C. [Frog Level Area] (Docket No. 37);

3. BAWC Motion for 7 U.S.C. § 1926(b) & 42 U.S.C. § 1983 Summary Judgment on Liability Pursuant to F.R.C.P. 56(c) filed april 24, 1996 (Docket #28);

4. BAWC Memorandum in Support of Its Motion for 7 U.S.C. § 1926(b) and 42 U.S-.C. § Summary Judgment on Liability Pursuant to F.R.C.P. 56(c) filed April 24, 1996 (Docket No. 29);

5. BAWC Exhibits Referenced in BAWC'S Memorandum in Support of Its Motion for 7 U.S.C. § 1926(b) & 42 U.S.C. § 1983 Summary Judgment on Liability Pursuant to F.R.C.P. 56(c) filed April 24, 1996 (Docket No. 30); and

6. Attachment 1, Historical Background. Further, to aid this Court, Plaintiff has prepared and includes here by reference its Statement of Undisputed Material Facts ("FACTS").

## CLAIM FOR RELIEF

BAWC brought this action against Defendants pursuant to 7 U.S.C. § 1926(b), a part of the Consolidated Farm and Rural Development Act of 1961 ("CFRD").[1]

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[1] Additionally, BAWC's federal loan based claim is supported by the Agricultural Credit Act of 1987 ("ACA"), Pub. L. 100-233 (1988), Title VIII, Section 803 (f) ***[Right of First Refusal]*** & (g) ***[Extension of Non-Impairment Protection of 7 U.S.C. § 1926(b)]***, which amended Section 1001 of the Omnibus Budget Reconciliation Act of 1986 ("OBRA"), Pub.L.No. 99-509.

# APPENDIX V

**UNITED STATES DISTRICT COURT**
**FOR THE**
**NORTHERN DISTRICT OF IOWA**
**WESTERN DIVISION**

**REPLY TO PLAINTIFF'S RESPONSE TO CITY'S MOTION FOR SUMMARY JUDGMENT**

**(RURAL WATER SYSTEM #1 V. CITY OF SIOUX CENTER, IOWA, CIV. NO. C95-4112-MWB (N.D.W.D. IA))**

**Pages 59a - 63a**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

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| | | |
|---|---|---|
| RURAL WATER SYSTEM #1, an Iowa Non-Profit Corporation | ) | Civil No. 95-4112-MWB |
| Plaintiff | ) | |
| v. | ) | |
| CITY OF SIOUX CENTER, IOWA, | ) | REPLY TO PLAINTIFF'S RESPONSE TO CITY'S MOTION FOR SUMMARY JUDGMENT |
| Defendant | ) | |

---

COMES NOW THE DEFENDANT, City of Sioux Center, and files the following reply to the Response to Motion for Summary Judgement filed by the Plaintiff.

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Conclusion . . . . . 7

## 1. Questions under 7 U.S.C. §1926(b).

Despite the voluminous amount of paper filed in conjunction with these cross motions for summary judgment, the heart of this dispute in this case rests on a fairly narrow issue: Was plaintiff protected by 7 U.S.C. §1926(b) during the period between September 22, 1988 and July 1, 1992? It is during this period that the City of Sioux Center annexed the disputed territory. Under state law Sioux Center is legally entitled to serve in the disputed area and plaintiff is in fact prohibited from serving within two miles of Sioux Center's city limits without the City's permission. *See* Iowa Code §357A.2. In short, if plaintiff continued to be protected by §1926(b) when it was not indebted to the United States, then Sioux Center's actions violate the section. But if plaintiff did not enjoy the projections of §1926(b) from 1988 to 1992, then the actions of Sioux Center were lawful and Sioux Center is entitled to the right to exclusively serve the area within two miles of its city limits as they existed on July 1, 1992.

To resolve this issue, the court must determine whether a debtor who paid off its FmHA debts under the federal buy out program falls within the purview of 7 U.S.C. §1929a note, subsection (g). (The characterization of the transaction as a "refinance" or a "repurchase" or a "sale" is irrelevant -- the federal debt is extinguished in any case). There are only two published decisions that have considered the issue. *See Scioto Regional Water Dist. No. 1 v. Scioto Water Dist., Inc.*, 95-3918, U.S. App. Lexis 33031 (6th Cir. Dec. 18, 1996); *City of Grand Junction v. Ute Water Conservancy Dist.*, 900 P.2d 81 (Colo. 1995). Sioux Center has previously articulated its position that the Sixth Circuit correctly analyzed the statutory scheme in the *Scioto* case, a case decided less than two months ago.

Rural Water System attempts to counter *Scioto* with a bound of "legislative folio" which purports to demonstrate that the legislative history supports its position. Were the court to wade through this mountain of material it would discover that despite plaintiff's numerous protestations to the contrary, the legislative history says absolutely nothing about the issue before the court.[1]

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[1]This point was also made by Judge Beckwith in her *Scioto Water* district court opinion: "Defendant has also cited portions of the legislative history. However, the legislative history does not provide any insight with regard to the specific issue before the court." *See* slip opinion attached to Sioux Center's brief in resistance to plaintiffs' motion for summary judgment at 12 n.6.

Plaintiff also cites numerous authorities, ranging from state and federal cases to the Old Testament, to bolster its interpretation of the statutory scheme. Again, none of these authorities have anything relevant to say about the issue before the court. The only federal case which *has* analyzed the precise issue before this court, the *Scioto* case, was not even mentioned in plaintiff's initial brief despite the fact that it had been decided two weeks before plaintiff submitted its initial summary judgment brief to this court and despite the fact that counsel for plaintiff, Mr. Rosenberg, appeared as counsel of record in both brief and argument in the *Scioto* case. After Sioux Center identified the *Scioto* case in its summary judgment brief, plaintiff devoted a total of three paragraphs out of a thirty-seven page resistance brief to the *Scioto* case. Plaintiff argues that the *Scioto* case should be disregarded because the Sixth Circuit failed to follow its own rules of statutory construction, and, bafflingly, that the Sixth Circuit "erroneously relied on common law" in reaching its decision. *See* plaintiff's resistance brief at 24. The *Scioto* decision is not in error. Sioux Center urges the court to follow the reasoning of the Sixth Circuit and hold that the projections of §1926(b) do not apply to one-time debtors like plaintiff who extinguished their federal debt under the buy-out program, and therefore, that plaintiff was not protected by

§1926(b) during the period from September 22, 1988, through July 1, 1992.[2]

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[2] As discussed in an earlier brief the Department of Agriculture also takes the position that former borrowers that who have paid off FmHA loans under the debtor buy-out program are not covered by the projections of section 1926(b). If the court finds that the statutory scheme is not clear it must defer to this agency interpretation so long as the interpretation is a permissible construction of the statute. *See Chevron, U.S.A., Inc. v. Natural Defense Council, Inc.*, 467 U.S. 837, 843-44.

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# In the Supreme Court of the United States

OCTOBER TERM, 1996

SCIOTO COUNTY REGIONAL WATER DISTRICT NO. 1, AUTHORITY, PETITIONER

*v.*

SCIOTO WATER, INC., ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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15 pp

## QUESTION PRESENTED

Whether the service area protections of Section 306(b) of the Consolidated Farm and Rural Development Act of 1961 (7 U.S.C. 1926(b)), which are afforded to entities that have obtained loans from the Farmers Home Administration under that Act, apply after the obligation has been reacquired by the debtor under terms discharging the loan.

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# In the Supreme Court of the United States

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SCIOTO COUNTY REGIONAL WATER DISTRICT NO. 1, AUTHORITY, PETITIONER

*v.*

SCIOTO WATER, INC., ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-10a) is reported at 103 F.3d 38. The order of the district court (Pet. App. 11a-26a) is unreported.

### JURISDICTION

The judgment of the court of appeals (Pet App. 1a) was entered on December 18, 1996. The petition for a writ of certiorari was filed on March 18, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. a. Section 306(a)(1) of the Consolidated Farm and Rural Development Act (Rural Development Act),[1] Pub. L. No. 87-128, 75 Stat. 308 (7 U.S.C. 1926(a)(1)), authorizes the Secretary of Agriculture "to make or insure loans to associations, including * * * public and quasi-public agencies," for certain types of projects to be undertaken "primarily [for] serving farmers, ranchers, farm tenants, farm laborers, rural businesses, and other rural residents." The purposes for which federal financial assistance may be provided under Section 306(a)(1) include projects for "the conservation, development, use, and control of water." Subsection (b) of Section 306 (7 U.S.C. 1926(b)) provides that the service areas of those associations that have received federal loan assistance under Section 306(a) may not be curtailed or limited by other public entities, or by franchises issued to private entities, "during the term of such loan."[2]

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[1] Section 306 was originally enacted as part of Title III of the Agricultural Act of 1961, Pub. L. No. 87-128, 75 Stat. 308. Section 301 of that statute provided that Title III may be cited as the "Consolidated Farmers Home Administration Act of 1961." 75 Stat. 307. By Section 101(a) of the Rural Development Act of 1972, Pub. L. No. 92-419, 86 Stat. 657, Congress revised the name of Title III to the "Consolidated Farm and Rural Development Act."

[2] Section 306(b) provides:

> The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis

Section 116 of the Rural Development Act of 1972, Pub. L. No. 92-419, 86 Stat. 661-662, amended the Consolidated Farm and Rural Development Act by, among other things, adding a new Section 309A (7 U.S.C. 1929a). Section 309A(a) (7 U.S.C. 1929a(a)) created the Rural Development Insurance Fund to "be used by the Secretary as a revolving fund for the discharge of obligations of the Secretary under contracts guaranteeing or insuring rural development loans." That provision defines "rural development loans" as including loans issued under Section 306(a) of the Rural Development Act.

b. Section 1001(a) of the Omnibus Budget Reconciliation Act of 1986 (OBRA), Pub. L. No. 99-509, 100 Stat. 1874 (7 U.S.C. 1929a note), directed that "[t]he Secretary of Agriculture, under such terms as the Secretary may prescribe, shall sell notes and other obligations held in the Rural Development Insurance Fund established under section 309A of the Consolidated Farm and Rural Development Act [7 U.S.C. 1929a] in such amounts as to realize net proceeds to the Government of not less than" certain prescribed sums for the fiscal years 1987 through 1989.

OBRA Section 1001 was amended on January 6, 1988, by Section 803 of the Agricultural Credit Act, Pub. L. No. 100-233, 101 Stat. 1714, which added subsections (f) and (g) to Section 1001. Subsection (f) provides that before selling notes or other obligations under Section 1001, the Secretary shall first give the issuer of the note or obligation the opportunity to

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of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

purchase it. Subsection (g) provides that Section 306(b) of the Rural Development Act shall be applicable to notes or other obligations sold or intended to be sold under Section 1001.[3]

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[3] Subsections (f) and (g) state in pertinent part:

(f) Right of First Refusal.—

(1) In General.—Before conducting a sale of a portfolio of notes or other obligations under this section, the Secretary of Agriculture shall—

(A) determine whether the issuer of any unsold note or other obligation desires to purchase the note or other obligation; and

(B) if so, hold open for 30 days, an offer to sell the note or other obligation to the issuer at a price to be determined under paragraph (2).

(2) Determination of Offering Price.—

(A) Authority.—The Secretary of Agriculture shall determine, in accordance with subparagraph (b), the price at which a note or other obligation shall be offered for sale under this subsection.

(B) Price.—Such price shall be determined by discounting the payment stream of such note or other obligation at the yield on the then most recent sale of the portfolio, adjusted for changes in market interest rates, servicing and sales expenses, and the maturity and interest rate of such note.

* * * * *

(g) Applicability of Prohibition on Curtailment or Limitation of Service.—Section 306(b) of the Consolidated Farm and Rural Development Act (7 U.S.C. 1926(b)) shall be applicable to all notes or other obligations sold or intended to be sold under this section.

2. On January 10, 1989, the Farmers Home Administration (FmHA)[4] issued a notice to FmHA community programs borrowers announcing a Discount Purchase Program (DPP) for FmHA borrowers and providing information about that program.[5] The notice was titled "Important Information Concerning Your Opportunity to Prepay Farmers Home Administration Loan at a Discount." SWI App. 35a. The notice stated that loans sold under the DPP would only be sold directly to borrowers, "and any loan purchased at a discount will be stamped 'Satisfied in Full.'" *Id.* at 42a. The notice referred to the purchase price to be paid by a borrower purchasing its loan under the DPP as being the "final payoff." *Id.* at 41a, 45a, 51a, 52a.

3. Petitioner is a regional water district that has operated in Scioto County, Ohio, since 1966. In the late 1960s and early 1970s, petitioner issued several million dollars in bonds to FmHA pursuant to Section 306 of the Rural Development Act. Pet. 5. In 1989, petitioner participated in the DPP by purchasing all of its FmHA-held debt at a discounted amount. Pet. 7; Pet. App. 5a, 13a. As petitioner acknowledges (Pet. 15 n.8, 27, 28), FmHA marked petitioner's bonds as "paid in full" when petitioner purchased them in 1989. Petitioner financed the reacquisition of its FmHA

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[4] FmHA was at the time the agency within the Department of Agriculture charged with administering the Rural Development Act and associated programs. FmHA was the predecessor to the agency now known as the Rural Economic and Community Development Service. For convenience, this brief employs the designation "FmHA."

[5] A copy of the January 10, 1989, notice is reproduced at pages 35a-54a of the appendix to the brief in opposition filed by respondent Scioto Water, Inc. (SWI App.).

debt by issuing new bonds through a non-federal entity. Pet. 7; Pet. App. 5a, 13a.

4. Petitioner commenced this suit against respondents Secretary of Agriculture, *et al.*, and Scioto Water, Inc. (SWI) in 1995. Petitioner alleged, among other things, that it was entitled to the service area protections set out in Section 306(b) of the Rural Development Act and that certain actions being undertaken by SWI, a private, nonprofit water supply corporation, were in violation of Section 306(b). Petitioner further asserted that the federal parties were violating Section 306(b) by extending financial assistance to SWI. Petitioner sought injunctive relief. Pet. App. 95a, 100a-102a.

SWI moved to dismiss the complaint. Petitioner moved for partial summary judgment on the Section 306(b) issue and the federal parties likewise moved for summary judgment on that issue. Pet. App. 11a.

The district court, finding that petitioner had failed to state a claim for relief under Section 306(b), granted the motion to dismiss. In accordance with that disposition, the court denied petitioner's motions for injunctive relief and for partial summary judgment as moot. Pet. App. 26a.

5. The court of appeals affirmed. Pet. App. 2a-10a. The court of appeals concluded that the service area protections afforded by Section 306(b) remain effective only for the duration of the loan, and that because petitioner's Rural Development Act loan was discharged when petitioner purchased that loan through the DPP, the Section 306(b) protections to which petitioner had formerly been entitled were no longer in effect. In the court's words (Pet. App. 10a):

> We note that cases brought in federal court under [Section 306(b)] have consistently emphasized the requirement of federal indebtedness to obtain [Section 306(b)] protection. When an issuer buys back its own bond and cancels the debt, however, it no longer qualifies as a debtor for [Section 306(b)] protection. * * *

The court of appeals distinguished *City of Grand Junction* v. *Ute Water Conservancy District*, 900 P.2d 81 (1995) (Pet. App. 27a-66a), in which the Colorado Supreme Court ruled that a Section 306(a) borrower remained entitled to the protections of Section 306(b) after repurchasing its loan from FmHA. The court below reasoned that the *Ute Water* transaction had been specifically and intentionally structured by FmHA and the debtor so as not to discharge the previously-issued debt instrument. In contrast, petitioner's bonds, which had been marked "paid in full," had been discharged. Pet. App. 9a-10a.

## ARGUMENT

The decision of the court of appeals is correct, is not in conflict with any other federal or state court decision, and presents no recurring issue of law warranting review by this Court. Accordingly, the petition for a writ of certiorari should be denied.

1. Petitioner asserts (Pet. 29) that "[OBRA] Section 1001(g) plainly and unambiguously states congressional policy that the service area protections [of Section 306(b) of the Rural Development Act] are to continue for the term of any notes sold or even intended to be sold under OBRA, whether the sale is to a third party or to the debtor district." OBRA Section 1001(g), however, does not so state. Rather, Section 1001(g) states that "Section 306(b) of the

Consolidated Farm and Rural Development Act (7 U.S.C. 1926(b) shall be applicable to all notes or other obligations sold or intended to be sold under this section." Thus, OBRA Section 1001(g) provides only that notes and obligations sold under that section are governed by Section 306(b) of the Rural Development Act.

Section 306(b), in turn, establishes certain service area protections, but it expressly makes those protections applicable only "during the term of [the] loan." See *Glenpool Utility Services* v. *Water District No. 2*, 861 F.2d 1211, 1216 (10th Cir. 1988) (the "right * * * [conferred by Section 306(b)] is not permanent, but contingent upon the district's outstanding federal debt"), cert. denied, 490 U.S. 1067 (1989). Hence, under Section 306(b), the service area protections of that provision terminate when the loan itself comes to an end. Here, as the court of appeals concluded, petitioner's FmHA loan was discharged when petitioner purchased that loan through FmHA's Discount Purchase Program and its bond was marked "paid in full."[6]

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[6] As the Sixth Circuit noted, while they do not address the specific issue presented here, "cases brought in federal court under 7 U.S.C. § 1926(b) have consistently emphasized the requirement of federal indebtedness to obtain" protection under the Rural Development Act. Pet. App. 10a. See, *e.g.*, *North Alamo Water Supply Corp.* v. *City of San Juan*, 90 F.3d 910, 915 (5th Cir.) (noting that "[e]very federal court to have interpreted § 1926(b) has concluded that the statute should be liberally interpreted to protect FmHA-indebted rural water associations"), cert. denied, 117 S. Ct. 586 (1996); *City of Madison* v. *Bear Creek Water Ass'n, Inc.*, 816 F.2d 1057, 1059 (5th Cir. 1987) (noting that 7 U.S.C. 1926(b) provides "[a] bright-line rule" protecting water associations indebted to FmHA "throughout the FmHA loan term").

2. The court of appeals correctly recognized (Pet. App. 9a-10a) that its decision here is not in conflict with the Colorado Supreme Court's decision in *Ute Water Conservancy District*, *supra*. In *Ute Water*, the question was whether Congress intended to afford service area protection in the case of "reacquisition by an issuer of a bond held by the FmHA, *where the parties intended not to discharge the bond.*" 900 P.2d at 91 (Pet. App. 52a) (emphasis added). After reviewing relevant federal statutes, the Colorado court expressly stated that, for the service area protections of Section 306(b) to remain applicable, "the FmHA loan must be outstanding." 900 P.2d at 90 (Pet. App. 50a). The court noted that the transaction in which the *Ute Water* debtor reacquired its FmHA bond had not actually discharged the subject bond because the transaction had been specifically and intentionally structured by the participants so as to avoid discharge of the obligation. *Id.* at 86 (Pet. App. 39a-40a).[7] The court held (*id.* at 92 (Pet. App. 53a)) that OBRA Section 1001(g) "authorized the FmHA to sell all notes or other obligations without removing the protection provided to rural districts under section 1926(b), including selling the * * * bond back to the issuer when the parties intended that the bond remain outstanding." Accordingly, the *Ute Water* court stated that the Section 306(b) service area protections

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[7] The water conservancy district in *Ute Water* apparently structured its reacquisition of the FmHA bond in a manner allowing that debt to remain outstanding in order to preserve the ability to resell the bond in the future. 900 P.2d at 86 (Pet. App. 39a-40a).

would remain in effect until the bond was actually discharged. 900 P.2d at 97 (Pet. App. 66a).[8]

Here, in contrast, the court of appeals found that petitioner's bonds had been discharged, as evidenced by the fact that those bonds had been marked "paid in full" and no further obligation to FmHA remained. Pet. App. 10a. That holding is not in conflict with *Ute Water*.

3. Petitioner asserts (Pet. 27) that because the district court resolved this case on the basis of a motion to dismiss filed pursuant to Federal Rule of Civil Procedure 12(b)(6), the court of appeals acted improperly by looking beyond the face of the complaint in concluding that petitioner's bonds had been discharged. An appellate court, however, may affirm a district court's judgment on any basis in the record, see *Blum* v. *Bacon*, 457 U.S. 132, 137 n.5 (1982), and Federal Rule of Civil Procedure 12(c) provides that "[i]f, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

Since petitioner itself moved in the district court for summary judgment on the Section 306(b) issue, and the federal parties cross-moved for summary

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[8] Given the *Ute Water* court's finding that FmHA and the debtor water district had structured their loan purchase agreement so as not to discharge the subject bond, any language in that opinion that might be read as suggesting that Section 306(b) service area protections could continue in effect even upon the discharge of the underlying bond would be *dicta*.

judgment on that question, petitioner was afforded a reasonable opportunity to submit all materials pertinent to that issue. Notably, although respondents distinguished the *Ute Water* decision in the proceedings below on the basis that *Ute Water* involved a purchase agreement that did not discharge the underlying bond, petitioner did not contend that its own bonds had not been discharged. Rather, petitioner argued that under OBRA Section 1001(f) and (g), it remained entitled to Section 306(b) service area protections irrespective of whether its debt was discharged at the time it purchased the bonds from FmHA. Hence, petitioner should not now be heard to contend that the court of appeals acted improperly by finding that petitioner's bonds, unlike the bond in *Ute Water*, had been discharged. In any event, that narrow procedural issue does not warrant review by this Court.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

# Supreme Court of the United States

October Term, 1996

SCIOTO COUNTY REGIONAL WATER DISTRICT NO. 1, AUTHORITY,

*Petitioner,*

v.

SCIOTO WATER, INC., AND DANIEL R. GLICKMAN, SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## OPPOSED MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE and AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## OPPOSED MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

To: The Supreme Court of the United States.

1. Cass Rural Water Users Incorporated hereby respectfully moves that this court permit it to file a brief in this case amicus curiae pursuant to Rule 33 of the Rules of this Court. The applicant has obtained the consent of the Petitioner in this cause to file said brief, but has not obtained consent of the Respondent.

2. The grounds of this motion are as follows:

a. The movant is a non-profit rural water district which is directly impacted by the Sixth Circuit Court of Appeals' decision for which the Petitioner seeks review.

b. The movant is involved in a dispute, which is based on issues that parallel the issues before the Court in this action.

c. The amicus curiae brief for which this motion is filed is necessary to demonstrate the impact of the Court's decision on those other than the immediate parties.

d. The issues for which the Petitioner is requesting the Court's consideration are issues that impact the movant and rural water associations nationwide. The need for clarification and guidance on these issues are crucial to the continued existence of rural water associations.

3. Walter Dellinger, Acting Solicitor General of the United States Department of Justice, and Ralph Tarr, counsel for Petitioner, Scioto County Regional Water District No. 1, have granted their consent to the filing of Movant's Brief as amicus curiae. After correspondence

with Steven L. Mowery, counsel for Respondent, Scioto Water, Inc., and James Coombe, counsel for Respondent, U.S.D.A., the same have withheld their consent of the filing of Movant's Brief as amicus curiae.

4. Cass Rural Water Users Incorporated respectfully prays that it be accorded leave to file a brief amicus curiae in order to present arguments and viewpoints on the matters involved in the case, which the parties themselves may not present.

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## INTEREST OF AMICUS CURIAE

Cass Rural Water Users Incorporated is a rural water association that has been negatively impacted by the decision of the Sixth Circuit Court of Appeals in this cause. Cass Rural Water Users's interests are detailed more fully in the Motion for Leave to File Brief Amicus Curiae that accompanies this Brief.

Cass Rural Water Users submits this Amicus Brief in support of Petitioner, Scioto County Regional Water District No. 1's Petition for Writ of Certiorari. The Petitioner is requesting that a writ be granted and that the Court take this opportunity to provide guidance to the federal and state courts that are currently faced with this issue and will be inundated by cases following the Sixth Circuit decision. We support and join in the Petitioner's request.

## INTRODUCTION

Cass Rural Water Users Incorporated is a non-profit corporation organized to provide water and make water service available to residents of rural areas in Cass County, North Dakota, an area recently devastated by flooding. Cass Rural Water serves all areas in Cass County that fall outside a boundary located in and around the city limits of Fargo, North Dakota, most of which is rural, with the exception of a few small towns located in the service area.

The system was constructed in the 1970's to provide approximately 800 families in the Cass County area with improved water quality and quantity. Cass Rural Water

Users now serve more than 2,500 customers. More than 10,000 people in the Cass County area are benefitted by the inexpensive high quality water Cass Rural Water provides.

Cass Rural Water Users constructed a rural revenue-based water supply and distribution system in 1976 with money borrowed from the Farmers Home Administration under 7 U.S.C. § 1926(a) in 1976. In 1989 Cass repurchased its notes from FmHA as part of the Gramm-Rudman-Hollings Act (OBRA 1986, 1001), and refinanced the debt through a revenue-based loan with the Bank of North Dakota.

The City of Fargo is expanding into those areas which are currently served by Cass Rural Water. Fargo intends to provide competing water service and overlap these areas. Cass Rural Water intends to continue providing and making service available to those in its service area, which creates an obvious conflict. If Fargo is allowed to expand its competing water service within Cass Rural Water's service area, Cass Rural Water will be unable to fulfill the congressional purpose of rural water development, which is the financial viability of the rural water provider and low per-user cost.

The City of Fargo has a current population of approximately 80,400 and it continues to rapidly grow and expand. To date, Cass Rural Water Users have been able to prevent the curtailment by the City of Fargo with the protection afforded it under 7 U.S.C. § 1926(b).

## REASONS FOR GRANTING THE WRIT

Cass Rural Water and rural water suppliers throughout the country will be directly and negatively impacted by the Sixth Circuit decision. The protection rural water associations have relied on and developed their services around has been destroyed by the decision. The precedent that has developed around and the interpretation of the protection provided by 7 U.S.C. § 1926(b) as extended by 1986 OBRA, 1001, as amended by ACA (1001(g)), up to this point has been clear: The notes and bonds sold were sold without removing the protection provided for rural water districts and their lenders, whether they were sold to third parties or the issuers. *City of Grand Junction v. Ute Water Conservancy Dist.*, 900 P.2d 81, 85 and 90-91 (Colo. 1995). The decision of the Sixth Circuit directly contradicts that precedent and proper statutory interpretation.

By denying the Petitioner's request for a writ and allowing the decision of the Sixth Circuit to stand, the continued existence of Cass Rural Water and other rural water associations is threatened. Water associations throughout the country were created with the assistance of federal funds under 7 U.S.C. § 1926(a) and have continued to exist because of the protections against municipal curtailment afforded them under § 1926(b). The congressional purposes behind promoting the water associations were: "1) to encourage rural water development by expanding the number of potential users of such systems, thereby decreasing the per-user cost, and 2) to safeguard the viability and financial security of such associations

(and FmHA's loans) by protecting them from the expansion of nearby cities and towns." *City of Madison, Mississippi v. Bear Creek Water Association, Inc.*, 816 F.2d 1057, 1060 (5th Cir. 1987).

The only way Cass Rural Water, Scioto County and rural water associations nationwide can continue to provide an inexpensive and quality water supply to their patrons as intended by Congress is to spread the cost out over their existing customer base. In Cass Rural Water's case, by taking away those patrons of Cass Rural Water subsequently located in and near the City of Fargo by annexation, the ability of Cass Rural Water to meet its current obligations and continue operations is threatened, the effect of which would be financial devastation.

As did Scioto County Regional Water District, Cass Rural Water purchased its own notes under Section 1001 of OBRA. Water suppliers such as Scioto County and Cass Rural Water repurchased their notes and bonds with the understanding that the protection against encroachment under § 1926(b) would continue as per the language of ACA. If the Court does not address this issue, rural water associations such as Cass Rural Water and Scioto County would be subject to municipal curtailment thereby precluding their efforts to fulfill the legislative intent for rural water purveyors to provide an inexpensive and quality water supply to rural areas.

In the past it has been well settled that water suppliers who repurchased their notes under Section 1001 of OBRA were still afforded the protection of 7 U.S.C. § 1926(b) (Section 1001(g)). The preceding Sixth Circuit Court of Appeals and District Court decisions go against

this well settled application of the protection, as well as the precedent set by *City of Grand Junction v. Ute Water Conservancy Dist.*, 900 P.2d 81. The Colorado Supreme Court in *Ute* found that the plain language of Section 1001(g) of OBRA included protection for rural water suppliers like Scioto County Regional Water and Cass Rural Water Users. As the Court in *Ute* found the language of Section 1001(g) of OBRA clearly includes protection for issuers who repurchased their notes and that protection should be continued. Cass Rural Water Users has relied heavily and had intended to rely on the *Ute* decision to challenge future curtailment by the City of Fargo.

The need for § 1926(b) protection has not changed. If anything, as in Cass Rural Water's case, the need for the protection has increased, as municipalities such as Fargo continue to expand. The municipalities are willing to provide services to densely populated areas, but are not willing to extend those services to the more sparsely populated areas currently served by rural water associations. Allowing municipalities to expand would adversely affect the congressional purpose, resulting in "lost economies of scale" and "higher per-user costs". *City of Madison, Mississippi v. Bear Creek Water Association, Inc.*, at 1059.

> To allow expanding municipalities to "skim the cream" by annexing and condemning those parts of a water association with the highest population density (and thus the lowest per-user cost) would undermine Congress's purpose of facilitating inexpensive water supplies for farmers and other rural residents . . .

*Id.* at 1060.

By taking away the § 1926(b) protection originally and continuously afforded to these associations, they will lose their service areas located within or near cities' limits, thereby threatening the existence and continued economic viability of those rural water providers. To date, the application and interpretation has been that § 1926(b)'s protection clearly continues to protect those who repurchased their own notes. The protection of § 1926(b) must continue as it has in order to advance the legislative purpose intended: to provide an inexpensive, quality water supply to those in rural areas.

## CONCLUSION

The Petition For a Writ of Certiorari by Petitioner Scioto County Water District No. 1 should be granted.

Respectfully submitted this 15 day of May, 1997.

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Supreme Court, U.S.
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No. 96-1498

In The

# Supreme Court of the United States

October Term, 1996

SCIOTO COUNTY REGIONAL WATER DISTRICT NO. 1, AUTHORITY,

*Petitioner,*

v.

SCIOTO WATER, INC., and DANIEL R. GLICKMAN, Secretary, United States Department of Agriculture,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

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## INTRODUCTION

Respondents rest virtually all of their arguments against granting the Petition upon facts that are irrelevant under this Court's precedents concerning interpretation of statutes. In Section 1001(g) of OBRA,[1] Congress clearly and unambiguously specified that the protections of 7 U.S.C. §1926(b)[2] are to apply to *all* sales of certain notes and other obligations, making no distinction between a sale of Petitioner's bonds to a third party and one to Petitioner. Federal Respondents do not have discretion under Section 1001(g) to structure the sale transaction in a manner that defeats this intent. The Sixth Circuit erred in relying on the irrelevant facts created by Federal Respondents, and on the effect of those facts claimed by Respondents, to reach a result directly contrary to the clear and unambiguous intent of Congress.

## ARGUMENT

### I. The Decision of the Sixth Circuit Creates a True, Direct, and Irreconcilable Conflict with the Relevant Decisions of This Court Concerning the Proper Judicial Construction of Federal Statutes.

#### A. The Sixth Circuit Decision Fails to Give Effect to the Clear and Unambiguous Language of Section 1001(g) of OBRA.

The language of Section 1001(g) is clear, unambiguous and unequivocal: the service area protections of §1926(b) *"shall* be applicable to *all* notes or other obligations *sold* or *intended to be sold"* under Section 1001,

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[1] OBRA refers to the Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, 7 U.S.C. §1929a, note. Subsequent references herein will simply be to "Section 1001".

[2] Subsequent references herein will simply be to "§ 1926(b)".

without exception. (*Ute*, Pet.App., pp. 52a-54a.)[3] Respondents assiduously avoid analysis of the language of Subsection (g).[4] Nevertheless, their argument concedes Congressional intent in Section 1001(g) to save the service area protections of §1926(b).[5] Furthermore, neither of the Respondents maintain that the plain language of Section 1001(g) distinguishes between sales to third parties and sales to debtor districts.

Instead, both Respondents frame their respective Questions Presented in terms of §1926(b) and argue that the continued applicability of the service area protections is governed by §1926(b).[6] Respondents assume that Petitioner's bonds were discharged and the federal indebtedness terminated upon repurchase of its notes pursuant to Subsection 1001(f). Respondents, as did the Sixth Circuit,

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[3] *City of Grand Junction v. Ute Conservancy District*, 900 P.2d 81 (Colo. 1995) ("*Ute*"). The opinion is reprinted in the Appendix to the Petition ("Pet.App.").

[4] Respondent Scioto Water, Inc. ("SWI") does not even mention that section. Federal Respondents simply deny Petitioner's reading of Section 1001(g) and then state that it "provides only the notes and obligations *sold* under that section are governed by § 1926(b)." Fed. Opp., pp. 7-8. Federal Respondents treat the phrase "intended to be sold" as mere surplusage. This Court's precedents preclude such statutory construction. *Dunn v. Commondity Futures Trading Commission*, ___ U.S. ___, ___, 117 S.Ct. 913, 914, 137 L.Ed.2d 93, 101 (1997). See n.16, *infra*.

[5] Respondents acknowledge the effect of Subsection (g) in the third party context. (*See*, SWI Opp., p. 18). When a third party purchases the obligations there is no further *federal* indebtedness and, therefore, without the savings provisions of Subsection (g) the service area protections would be lost under the judicial precedent interpreting §1926(b).

[6] See n.4, *supra;* Fed. Opp., pp. 7-8. Respondents contend that the scope of the savings provisions of Section 1001(g) is governed by the language of the very statute which sets forth the protections to be saved.

then focus upon the language of §1926(b) precluding curtailment or limitation of the service area "during the term of the loan", and the case law holding that this language establishes a requirement of an outstanding federal indebtedness. (Fed. Opp., p. 8, n.6.) The argument concludes that Petitioner lost the service area protections of §1926(b), under the terms of that statute, instantaneously upon repurchase of its bonds.

The ultimate result of this reasoning is to completely frustrate the clear intent of Congress. (*Ute*, Pet.App., p. 54a). The underlying assumption that Petitioner's bonds were discharged and any indebtedness terminated upon the repurchase is not supported by Section 1001(g), and given the legal effect the Sixth Circuit and Respondents draw from this assumption, it is erroneous. There is no reason to conclude that Congress intended any effect of such a sale other than that Petitioner would hold its own bonds and make payments to itself "during the term of the [bonds]",[7] just as a third party purchaser would have held the bonds and received payments thereunder from Petitioner during the term of the bonds.

### B. Federal Respondents' Administrative Actions Cannot Defeat the Clear and Unambiguous Language of Section 1001(g).

Both Respondents, as did the Sixth Circuit, rely heavily on the January 10, 1989 notice concerning the Discount Purchase Program ("DPP") (the "Notice"),[8] which implements the right of first refusal mandated by

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[7] The Ute Water Conservancy District effectively accomplished this result, with the assistance of Federal Respondents, through a series of transactions involving different entities related to the district. (*See, Ute*, Pet.App., pp. 35a-37a, 55a-60a).

[8] A copy of the Notice is reproduced at pages 35a-54a of the Appendix to Respondent SWI's Opposition ("SWI App.").

Congress in Section 1001(f). The Notice reassures the debtor district in the event a third party sale is necessary "the terms and conditions of [its] loan will not change" and debtor districts "will have essentially the same rights, privileges, and obligations after the sale". *Id.* Attachment A to the Notice (SWI App., pp. 39a-54a) states that the permanent debt instrument will be stamped "Satisfied in Full" at the time of final payoff. (SWI App., p. 42a).

The service area protections are not mentioned in these documents, nor is either §1926(b) or Section 1001(g). Despite a paragraph in the Notice (SWI App., p. 37a) and a section in Attachment A entitled "VI. Special Considerations", which urge careful consideration of the financial risks and benefits (SWI App., pp. 52a-53a), these documents at no point warn that Federal Respondents believe that stamping the bonds "Satisfied in Full" will negate the savings provisions of Section 1001(g).

Neither Respondents nor the Sixth Circuit, identify a Congressional grant of discretion to determine the applicability of Section 1001(g).[9] To the contrary, Section 1001(g) does not condition its application on any administrative action. In sum, Congress did not give Federal Respondents the power to bargain for this term.[10] The

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[9] Federal Respondents offhandedly quote Section 1001(a) requiring the sale of certain obligations "under such terms as the Secretary may prescribe". (Fed. Opp., "Statement", p. 3). Although this language provides some discretion with respect to the mechanics of sale, it is not intended to override the terms and conditions specified by Congress in Subsections (b) through (e), and cannot be read to overcome the specific terms and conditions set forth in Subsections (f) and (g), which were added a year later by Section 803 of the Agricultural Credit Act of 1987, Pub. L. No. 100-233, Title VIII, §803, 101 Stat. 1714 (1988).

[10] That Congress mandated a "right of first refusal" is consistent with the definitive language of Section 1001(g),

actions and intent of the Federal Respondents in structuring the transaction, then, are irrelevant. The marking of Petitioner's bonds "paid in full" cannot defeat the saving effect of Section 1001(g) intended by Congress.

### C. The Sixth Circuit did not and Could not Defer to the January 10, 1989 Notice as a Settled Administrative Interpretation.

Under this Court's precedents, the threshold statutory construction inquiry is whether Congress addressed the issue in the language of the statute itself. "The 'strong presumption that the plain language of the statute expresses congressional intent is rebutted only in rare exceptional circumstances'." *Ardestani v. INS*, 502 U.S. 129, 135, 112 S.Ct. 515, 520, 116 L.Ed.2d 496, 505 (1990). Only if Congress entirely failed to address the issue or did so ambiguously should a court even consider administrative interpretation. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 2781-82, 81 L.Ed.2d 694, 703 (1984). In this case, the statute is clear and unambiguous on its face. Neither Respondents nor the Sixth Circuit find any ambiguity in the statutory language.[11] Thus, the Notice is not entitled

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because that right presumes the extension of an opportunity to purchase on the same terms and conditions as to a third party purchaser, except as those terms and conditions are specifically altered by the express provisions of Subsection (f).

[11] In fact, in attempting to distinguish the *Ute* decision based upon the manner in which Federal Respondents structured the respective transactions, Respondents and the Sixth Circuit implicitly acknowledge that Congress intended Section 1001(g) to apply to sales to debtor districts and maintain that the Federal Respondents have discretion whether to apply the savings provisions. They implicitly argue that Section 1001(g) *authorizes* rather than *directs* saving the §1926(b) protections.

to consideration, let alone deference, as urged by Respondent SWI.[12] *See, Dunn v. Commodity Futures Trading Commission*, ___ U.S. ___, 117 S.Ct. 913, 920, n.14, 137 L.Ed.2d 93, 105, n.14 (1997).

## II. The Decision of the Sixth Circuit Creates a True, Direct and Irreconcilable Conflict with the Decision of the Colorado Supreme Court in *Ute*.

Both Respondents and the Sixth Circuit seek to distinguish the decision of the Colorado Supreme Court in *Ute* on the basis that in *Ute* the parties intended not to discharge the bonds involved, but intended for the bonds to remain outstanding. (Fed. Opp., pp. 7, 9-10; SWI Opp., pp. 17-18). The Federal Respondents in *Ute* specifically and intentionally structured the transaction so as to avoid discharging the debt instrument. (*Ute*, Pet.App., pp. 58a-60a.) Thus, Respondents, and the Sixth Circuit, seek to distinguish *Ute* on the implicit basis that Federal Respondents had discretion to structure the Ute Water Conservancy District transaction differently from Petitioner's transaction so that the former enjoyed the savings provisions of Section 1001(g) while Petitioner does not.

In addition, contrary to the Sixth Circuit's decision (SWI Opp., pp. 16-17), the Colorado Supreme Court did not rely on state law, but rather found that the federal statutory scheme preempts state law with regard to bond redemption issues. (*Ute*, Pet.App., p. 42a). At the same time, the Sixth Circuit decision endorses the District Court's opinion that Section 1001(g) applies only to third parties. (*Ute*, Pet.App., p. 10a.)

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[12] In any case, the District Court, which through a strained interpretation not embraced by Respondents, did find ambiguity in the statutory language of Section 1001(g) (*See*, Pet.App. at pp. 24-25), but refused to find a settled administrative interpretation. Op. D.C., p. 14, n.8.

Thus, the Sixth Circuit decision is in direct conflict with the *Ute* decision. The Colorado Supreme Court determined that Section 1001(g) "*authorized* the FmHA to sell all notes or other obligations without removing the protection provided to rural districts under section 1926(b), including selling the . . . bond back to the issuer." (Pet.App., p. 53a.) Through this holding, given that there is no statutory grant of such discretion,[13] the Court also implicitly determined (though it could resolve the case before it without expressly doing so) that Section 1001(g) *directed* that result.

## III. The Sixth Circuit Did Not Reach the Proper Result in This Case, Which Presents an Important Federal Legal Question of First Impression.

Respondents imply that the Sixth Circuit reached the proper result in this particular case, and therefore this Court should deny the Petition. Respondent SWI implicitly suggests either that Petitioner waived its statutory right to continued service area protection or otherwise bargained it away. (SWI Opp., pp. 3, 4, 8, 15, 22). Neither of these implications is accurate, and the Sixth Circuit did not make such a finding.

Any reference in the Notice to the bonds being stamped "Satisfied in Full" as part of the transaction are irrelevant to the legal effect of Section 1001(g) and of no concern to Petitioner.[14] Petitioner could not be found to have bargained away its rights under §1926(b) because Federal Respondents had no authority under Section 1001 to engage in such a bargaining process or to require Petitioner to relinquish those statutory rights as they now seem to suggest. Furthermore, nothing in the Notice

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[13] See discussion in Section I. B., *supra*.

[14] In fact, Petitioner would expect some confirmation that it was no longer indebted to the federal government once the purchase price of the bonds was paid.

contemplated any such bargaining process. For the same reasons, Petitioner could not be found to have waived its statutory rights created by Congress. Furthermore, in the absence of any discussion in the Notice of potential loss of service area protection,[15] it could not be established that Petitioner knowingly and voluntarily relinquished those rights. *See, Moser v. U.S.*, 341 U.S. 41, 47, 71 S.Ct. 553, 556, 95 L.Ed. 729, 734 (1951).

Respondents imply that the discounted sale price establishes a bargained for relinquishment of service area protection. Respondents, however, acknowledge that Section 1001(g) operates to save the service area protections with respect to discount sales to third parties. In fact, in the first year of the program FmHA sold obligations to third parties at an enormous discount, as one might expect in such a commercial transaction, without disturbing the protections of §1926(b). In Section 1001(f), Congress simply accorded that same opportunity to debtor districts first. Congress did not intend to penalize debtor districts for purchasing their own notes, as evidenced by Congress' concurrent passage of Section 1001(g) (*Ute*, Pet.App., p. 54a) and debtor districts would not have purchased their own notes if they believed that it would jeopardize the protections of §1926(b). In the words of this Court in *U.S. v. Winstar Corp.*, ___ U.S. ___, ___, 116 S.Ct. 2432, 2472, 135 L.Ed.2d 964, 1012-13 (1996):

> It would, indeed, have been madness for respondents to have engaged in these transactions with no more protection than the Government's reading would have given them, for the very existence of their institutions would then have been in jeopardy from the moment their agreements were signed.

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[15] Therefore, the negative implication urged by Respondent SWI (SWI Opp., p. 15) with respect to references in these documents to a possible third party sale not altering Petitioner's rights and privileges (SWI App., p. 38a) simply does not arise.

Finally, the two options set forth in the Notice, (SWI Opp., p. 15), are nothing more than the two options established by Congress in Section 1001. Under Section 1001(a), Federal Respondents were to select obligations for sale and, before selling to third parties were to offer them for sale to the debtor district pursuant to Subsection (f). In either case, the sale is made under Section 1001 to meet the net proceeds requirements of Subsection (a), and Section 1001(g) makes it clear that *any* sale does not eliminate the protections of §1926(b).[16] The Notice does not state otherwise.

The Sixth Circuit's decision is therefore erroneous, and, threatens the economic survival of thousands of water districts across America. Without the protections of §1926(b), these rural water districts may no longer be able to service or provide reasonably priced water to hundreds of thousands of rural household customers. Therefore, the issue raised by this case is subject to repeated litigation.[17] The guidance of this Court is critical to the

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[16] By the phrase "intended to be sold" Congress emphasized this intent, even if the statute is inappropriately split apart in the manner adopted by the District Court to conclude that only a sale to a third party is a sale "under this section". (Op.D.C., pp. 14-16). Thus, the agency would select certain obligations to be sold to meet the net proceeds requirements of Subsection (a). In some cases, it would intend to sell them to third parties, but would instead sell them to debtor districts exercising their right to first refusal under Subsection (f). Thus, the "intended to be sold" phrase in Subsection (g) operates to assure implementation of Congressional intent that the §1926(b) protections not be lost in either case.

[17] In one of the cases described in the Petition as pending, *Rural Water System #1 v. City of Sioux Center, Iowa*, No. C95-4112-MWB, the District Court for the Northern District of Iowa, Western Division, just issued its Memorandum Opinion on May 27, 1997. The Court essentially adopted the analysis of the District Court in this case, that a sale of notes to the debtor district pursuant to Section 1001(f) is not a sale "under this

lives of these entities and their household water customers.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 4, 1997

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section" and therefore the savings provisions of Section 1001(g) do not apply. Slip Op., p. 44. The Court further found that Section 1001(g) is not ambiguous, that it clearly applies solely to sales to third parties and does not apply to sales to debtor districts. Slip Op., p. 51. In doing so, the Court relied heavily upon the fact that the notes there involved were marked "paid in full" when they were repurchased and the Court treated them as extinguished. *See, e.g.*, Slip Op., pp. 13, 34, 41, 50, 56. The opinion also acknowledges that the decisions of the Sixth Circuit in this case and of the Colorado Supreme Court in *Ute* are clearly in conflict, Slip Op., p. 41, but specifically adopts the position of the District Court and the Sixth Circuit in this case, *Id.* at p. 56, n.13. Finally, the District Court expressed its doubt that there is a settled administrative interpretation and declined to consider the agency view. Slip Op., p. 46, n.11. Petitioner has lodged a copy of the 81-page Memorandum Opinion with the Clerk of this Court.